TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 12

BAYARD EDWARD RYAN, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 29, 1963
CERTIORARI GRANTED FEBRUARY 17, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 590

BAYARD EDWARD RYAN, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. A] [File endorsement omitted]

No. 14,945

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

BAYARD EDWARD RYAN, Defendant-Appellant.

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Appendix to the Brief for the Appellant—Filed December 17, 1962

[fol. 1]

DOCKET ENTRIES AND INDEX OF ORIGINAL RECORD

1. Complaint filed 1- 3-62
2. Order for rule to show cause entered 1-10-62
3. Summons and returned filed 1-25-62
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5. Reply filed 3-12-62
6. Order entered directing defendant to turn over records to IRS 3-15-62
7. Notice of Appeal filed 3-23-62
8. Supersedeas bond filed 4- 2-62

I, Davis T. McGarvey, Clerk U. S. District Court for the Eastern District of Kentucky do hereby certify that the foregoing and attached is the entire original record of the case United States of America v. Bayard Edward Ryan, No. 1005, on the Civil Docket at Covington, Ky.

Witness my hand and seal of office this 6th day of April, 1962.

Davis T. McGarvey, Clerk, (s) George F. Regan, D. C.

[fol. 2]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

AT COVINGTON

No. 1005

UNITED STATES OF AMERICA, Plaintiff,

v.

BAYARD EDWARD RYAN, Blue Run Road, Maysville, Kentucky, Defendant.

COMPLAINT—Filed January 3, 1962

Comes the plaintiff, United States of America, by Bernard T. Moynahan, Jr., United States Attorney for the Eastern District of Kentucky, by William A. Watson, Assistant United States Attorney for the Eastern District of Kentucky, and for its cause of action states as follows:

1. That on or about August 21, 1961, Donald Whelan, an Internal Revenue Agent, Treasury Department, issued a summons as authorized by Title 28, Section 7602, U.S.C., directing the defendant, Bayard Edward Ryan, Blue Run Road, Maysville, Kentucky, to appear at the Internal Revenue Office, United States Post Office Building, Maysville, Kentucky, on the 5th day of September, 1961, at 10:30 A.M., then and there to testify concerning matters arising under the Internal Revenue Laws of the United States of America and relating to the income tax liability of the defendant, his former wife, Ruby Ryan, with whom he has previously filed joint returns, and his present wife, [fol. 3] Mary H. Ryan, with whom he has previously filed joint returns, the testimony to relate to income tax returns

submitted by these persons during the period 1942 through 1953.

2. That in addition to his own testimony the summons mentioned in paragraph 1, supra, required the defendant to produce and have before the aforementioned Donald Whelan and/or E. J. Stauble, an Officer of the Internal Revenue Service, all books, papers, records, or memoranda relating to personal and business income and expenses, including but not limited to deposit books, canceled checks, bank statements, duplicate deposit tickets, sales journals, purchases journals and purchases-sales invoices, cash receipts journals, cash disbursements journals, general journals, subsidiary accounts receivable and accounts payable records, note registers, balance sheets, profit and loss statements, correspondence files, security purchases and/or sales invoices, and all work papers in connection with the income tax liability of the defendant, Ruby Ryan, or Mary H. Ryan, during the years aforesaid.

3. That the summons mentioned in paragraph 1, supra, was issued after continuing efforts by Donald Whelan to obtain the books, papers, records and memoranda which are now in the possession, and were during the time those efforts continued, in the possession of the defendant, in order to complete an investigation that was and is in progress concerning the income tax returns of the defendant, the joint returns of the defendant and his former wife, Ruby Ryan, and the joint returns of the defendant and his present wife, Mary H. Ryan, during the years aforesaid.

4. That, pursuant to a net worth estimate of the defendant's assets which has been conducted by Donald Whelan [fol. 4] concerning the period from 1942 through 1953, reasonable grounds exist for a strong suspicion that the defendant, either individually or in the joint returns mentioned in paragraphs 1 and 3, supra, has made a fraudulent understatement of income on the income tax returns submitted by him, either individually or jointly with his former or present wife, during those years.

5. Plaintiff further states that the defendant, accompanied by his wife, Mary H. Ryan, and counsel, Mr. William R. Bagby of Lexington, Kentucky, appeared at the time and place designated in the aforementioned summons, but refused to testify as directed or to produce any of the books, papers, records, or memoranda which he was directed to produce in the summons.

6. Plaintiff states that the defendant, speaking through counsel, advised Donald Whelan, Internal Revenue Agent, that the aforesaid summons would be complied with if Whelan would furnish Mr. Bagby with facts relative to the years 1942 through 1953 which would indicate to Mr. Bagby that a reasonable ground for suspicion of fraud existed, which Whelan declined to do.

7. Plaintiff states that the books, papers, records, and memoranda sought from the defendant are relevant and material to the question of tax liability of the persons named in paragraph 1, supra, and that the summons directing their production is not unreasonable under the circumstances.

8. That this action is brought pursuant to Title 26, Section 7402(b), U.S.C.

Wherefore, plaintiff prays that the defendant, Bayard Edward Ryan, be ordered to appear before this Court and show cause why he should not be compelled to obey the summons mentioned hereinabove; that he be compelled to [fol. 5] obey said summons, and that the Court take all proper additional action as will require obedience to said summons; for all other proper relief.

Bernard T. Moynahan, Jr., United States Attorney,
By: William A. Watson, Assistant United States Attorney.

Duly sworn to by Donald Whelan, jurat omitted in printing.

[fol. 6]

In United States District Court

Answer—Filed January 25, 1962

The defendant, by and through his counsel, and in answer to the complaint filed in the above-entitled case and in response to the Rule issued thereon, admits, denies, and alleges as follows:

Paragraph 1: Denies all allegations set forth in Paragraph 1 except it is admitted that on or about August 21, 1961, Donald Whelan, an Internal Revenue Agent, Treasury Department, issued a summons directing the defendant, Bayard Edward Ryan, Blue Run Road, Maysville, Kentucky to appear at the Internal Revenue Office, United States Post Office Building, Maysville, Kentucky, on the 5th day of September, 1961 at 10:30 A.M.

Paragraph 2: Admits the allegations set forth in Paragraph 2.

Paragraphs 3 and 4: Denies the allegations set forth in Paragraphs 3 and 4.

Paragraph 5: Denies the allegations set forth in Paragraph 5 except it is admitted that the defendant, accompanied by his wife, Mary H. Ryan, and counsel, William R. Busby, of Lexington, Kentucky appeared at the time and place designated in the summons issued on or about August 21, 1961.

Paragraphs 6, 7 and 8: Denies the allegations set forth in Paragraphs 6, 7 and 8.

Further Answering, the defendant alleges as follows;

I. The defendant resides in Maysville, Kentucky and his principal place of business is there also. For several years his main business has been the operation of a small meat packing plant in Maysville, Kentucky. The available books and records for all his business activities are normally located at the packing plant.

II. Sometime in January, 1960, Donald Whelan, of Louisville, Kentucky, a revenue agent of the Internal Reve- [fol. 7] nue Service (herein referred to as the agent), began an examination of the defendant's income tax returns for the years 1957 and 1958. The examination began at the meat packing plant in Maysville and the agent spent about a week there during his first examination of the books and records.

III. The first examination was begun after a letter by the agent, dated January 18, 1960, addressed to the defendant. The letter stated that, if it were convenient with the defendant, the agent would meet the defendant at the meat packing plant in Maysville on January 25th, and requested to be notified of an alternative time and place convenient to the defendant if January 25th was not convenient.

IV. After the agent's first examination in January, lasting about a week, the next time the agent appeared at the packing plant, for a second examination of the books and records, was in February and March, 1960. This second examination was begun after a letter by the agent, dated February 18, 1960, addressed to the defendant. The letter stated that at his last meeting with the defendant in January, the agent had indicated he would notify the defendant when he would return to continue the examination. The agent further stated that he regretted that four weeks would have elapsed since the last meeting.

V. The agent however was not alone when he came for and during this second examination, which began on February 29, 1960, but he was accompanied and fully assisted by a special (fraud) agent of the Internal Revenue Service. A special (fraud) agent is called into an examination whenever a revenue agent suspects fraud and the special (fraud) agent remains in the examination so long as the special (fraud) agent suspects fraud or believes that there is a possibility of establishing fraud. The [fol. 8] revenue agent and the special (fraud) agent worked diligently together for two full weeks in Maysville during this second examination and then they both stopped and returned to Louisville.

VI. After the revenue agent and the special (fraud) agent finished their two weeks of the second examination (in March, 1960) the special (fraud) agent never returned again to Maysville in the case and the special (fraud) agent completely disappeared from and dropped out of the examination altogether. The revenue agent alone continued his two later examinations. Upon being asked later about the special (fraud) agent, the revenue agent advised that the special (fraud) agent was out of the examination and not working on the case.

VII. On April 11, 1960, the Commissioner mailed a statutory notice for the year 1956 giving the defendant 90 days in which to agree to the alleged deficiencies or to file a petition in the Tax Court of the United States. The defendant filed a petition on July 8, 1960 to which the Commissioner filed an answer. The case for the year 1956 (Docket #87907) has been set down for trial on a calendar of the U. S. Tax Court beginning in Cincinnati, Ohio, April 16, 1962.

VIII. By letter dated July 12, 1960, the agent advised the defendant that he had additional work before he could complete the examination of the 1957 and 1958 income tax returns. He acknowledged that he had been advised that all necessary books and records of defendant would be available at the offices of the defendant's lawyer in Lexington, Kentucky. His letter advised that he would go to the offices of defendant's lawyer in Lexington on July 18, 1960 but further asked to be notified of another date if July 18 were not convenient.

[fol. 9] IX. The agent further advised in his July 12 letter that he would, during the third examination, work toward completion of the examination of defendant's books and records.

X. The agent further said in his letter, dated July 12, 1960, that he anticipated that the returns for 1954 and 1955 would be audited and he further requested the defendant to make the books and records available in Lexington. He advised that otherwise a summons would be issued to require the defendant to bring the 1954 and 1955 books and records to Louisville.

XI. Thereupon, as scheduled, the agent arrived in Lexington on July 18, 1960 and alone began his third examination of the books and records for 1957 and 1958. All the books and records for 1957 and 1958 requested were made available to him at the lawyer's office in Lexington. After working most of the week, the agent advised that a member of his family had become ill and the agent received full cooperation in recessing the examination.

XII. Before leaving, the agent asked if the books and records for 1954 and 1955 would be available for examination and he requested Lexington as the site for their examination. The agent had freely acknowledged that he preferred to examine the books and records of the defendant in Lexington rather than Maysville.

XIII. By letter dated August 2, 1960, the agent advised defendant's lawyer that, with the latter's approval, he would come to Lexington on August 15, 1960 for the purpose of continuing the examination of defendant's income tax returns. He stated also in the letter that, if there were any reason the records could not be made available on August 15, then he wanted to be notified when they would be available.

[fol. 10] XIV. The agent added further in his August 2 letter that he anticipated that the visit of August 15 would complete the audit of defendant's income tax returns.

XV. The agent was advised that the requested books and records for 1954 and 1955 would be available in Lexington and that he was expected on August 15.

XVI. At the offices of the defendant's lawyer in Lexington, on August 15, 1960, the agent began his fourth examination. All requested books and records were made available to the agent, including those for 1954 and 1955.

XVII. At the end of the week of August 15, the agent departed for Louisville and advised that he had completed his examination for all years and that he was finally finished. He advised that he had received everything he required. He advised that he might still want to examine 1959 but would write later his decision on that. He has never since written about the year 1959.

XVIII. On September 1, 1960, the revenue agent mailed to defendant his preliminary statement of the proposed adjustment to income for 1954, 1955, 1957 and 1958, using the hybrid net worth method. This statement, known as the 10-day letter, advised that, if the defendant did not wish a conference, the full report of the examination would then be mailed so that the defendant could give further consideration to the matter. The agent's full report, known as the 30-day letter, was not mailed until February 24, 1961, and that report advised that the defendant could file a Protest to the income adjustments revealed in the full report. Since defendant filed a Protest on April 5, 1961, the returns for the years 1954, 1955, 1957 and 1958 are presently before the Treasury Department for consideration of the erroneously alleged civil liabilities.

XIX. In the meantime, early in the morning of October 24, 1960, without any advance warning, the agent swooped down upon the defendant's packing plant in Mays-[fol. 11] ville and demanded the books and records for each and every one of the years 1942 to 1953, inclusive. The agent was advised that he knew that defendant had counsel but the agent, in effect, suggested the defendant should forget his counsel. However, the defendant telephoned his lawyer in Lexington. During this call, the agent was requested to discuss his demands with the lawyer. Thereupon, the agent was advised that it was not understandable why he had not first communicated in advance with the defendant or the defendant's counsel about the proposed examination for 1942 to 1953, inclusive, just as he had done for each of the several (four) prior examinations and, particularly, in view of the full cooperation received in the past by the agent. The agent was advised that his extreme haste and strange behaviour were not understandable since the years 1942 to 1953, inclusive, had long ago been barred by all statutes of limitations and that a few more days or even weeks could make no difference.

XX. The agent was then asked the reason he felt justified in demanding the books and records for these years which were barred by all statutes of limitations.

The agent, although asked, did not then give any basis for his right to examine the records for 1942 to 1953, inclusive, except to say that he had thought about it. The agent was then advised that it was doubtful that he had a right to examine the books and records for the years 1942 through 1953, since those years were barred by all statutes of limitations and since there clearly appeared to be no reasonable indication of fraud.

XXI. The agent was requested to write a letter detailing the books and records demanded and, further, to set forth some basis or reason which would entitle him to examine the records for the years 1942 to 1953, inclusive, so that the matter could receive the full consideration and thought of the defendant and his counsel.

[fol. 12] XXII. The agent advised the defendant on the morning of October 24, 1960 that, if the books and records for 1942 to 1953, inclusive, were not made available then and there, he would forthwith issue a summons for them. The plaintiff did issue a summons on October 25, 1960 requiring the defendant to pack up all of his books and records and business papers for the years 1942 to 1953, inclusive, and carry them from Maysville to Louisville, Kentucky.

XXIII. The matter of the summons dated October 25, 1960 was however not pursued further by the defendant or by the agent or the Commissioner but was dropped by the agent and the Commissioner. The issuance of that summons was capricious and arbitrary.

XXIV. On August 21, 1961, the plaintiff issued another summons requiring the defendant to appear on September 5, 1961 at 10:30 a.m. before the agent or E. J. Stauble, another revenue agent, and requiring the defendant to produce certain named books and records. The defendant did appear as required and some of the requested records were there and the balance of the existing ones were readily available.

XXV. The defendant, by and through his counsel, tendered his testimony and all existing books and records requested and agreed to submit to the cross-examination of

the revenue agents and agreed to turn over the available books and records, if the agent would indicate some reasonable basis justifying the alleged suspicion of fraud in each of the years 1942 to 1953, inclusive. The meeting between the revenue agents and the defendant and his counsel was adjourned until after lunch on September 5 and all met again in the afternoon. Several hours were used by the agents, the defendant and his counsel in discussions but the agent never gave but refused to give any basis or fact to justify his demand to open up these years closed by all statutes of limitations.

[fol. 13] XXVI. The defendant did not testify and did not turn over his books and records to the agent on September 5, 1961, solely and only upon the advice of his counsel who advised the agent that it was counsel's opinion that the agent was not authorized or justified in examining the years closed by all statutes of limitations unless there was some showing of a reasonable basis for suspicion of fraud.

XXVII. The agent and others have been advised, from time to time, that the defendant would voluntarily permit an examination of all available books and records for the years 1942 to 1953, inclusive, if the plaintiff would reveal some valid reason to justify a reasonable suspicion that the defendant had committed fraud, but that, otherwise, the matter would out of necessity have to be resolved by the appropriate United States District Court.

XXVIII. The Commissioner of Internal Revenue has a record which reveals that the defendant filed a Federal income tax return for each and every one of the years 1942 to 1953, inclusive, and this record reveals that the defendant has paid income tax for each and every one of those years.

XXIX. The records of the Commissioner will reveal that the defendant paid the following taxes and reported the approximate adjusted gross income:

YEAR	TAX	ADJUSTED GROSS INCOME
1947	$ 2,460.37	$ 12,000.00
1948	3,948.24	21,000.00
1949	3,197.64	19,200.00
1950	3,923.96	21,300.00
1951	4,719.78	21,700.00
1952	10,833.04	34,300.00
1953	11,745.16	35,100.00
Totals	$40,828.19	$164,500.00

[fol. 14] XXX. The Commissioner has a record of the inspections and examinations made by Treasury agents of the defendant's books and records. This record reveals that the Commissioner, prior to 1960, had already made an examination of defendant's books and records for one or more of the years 1942 to 1953, inclusive. Yet, the Commissioner has not notified the defendant in writing that an additional inspection is necessary, as required by the 1954 Internal Revenue Code Sec. 7605(b), where one inspection has already been made.

XXXI. The Congress of the United States of America, from time to time, by its Acts, orders the destruction of filed Federal income tax returns. There is reason to believe that the defendant's filed returns for the years 1942 to 1953, inclusive, have been destroyed.

XXXII. The agent therefore does not have and has not had available for inspection and examination the filed income tax returns for 1942 to 1953, inclusive. Without these filed returns, the agent cannot know the content and detail of the filed returns and therefore cannot ascertain the correctness or lack of correctness of said filed returns. Since he does not know the content and detail of the filed returns, for that reason alone, without the many other reasons, the agent cannot and does not have any basis or reason to suspect fraud.

XXXIII. The treasury agents have never asked if all the books and records are still in existence for each and every one of the years 1942 to 1953, inclusive.

XXXIV. The defendant maintained and kept books and records for each of the years 1942 to 1953, inclusive, however, due to no fault of the defendant but due to fire and flood, the books and records for the years 1942 to 1947, inclusive, have not been in existence since about 1952.

[fol. 15] XXXV. Donald Whelan, the revenue agent, lives at 2585 E. Burnett Avenue, Louisville, Kentucky, and his next door neighbor is Archie G. Kimble, who lives at 2587 E. Burnett Avenue, Louisville, Kentucky.

XXXVI. The said Archie G. Kimble has assisted revenue agent Donald Whalen in phases of the examination of the defendant's income tax returns however at no time has Archie G. Kimble been employed by the Treasury Department.

XXXVII. Chester W. Kimble of 5311 Speedway Avenue, Valley Station, Jefferson County, Kentucky, on October 14, 1959, was convicted in the Mason County Circuit Court, Maysville, Kentucky for breaking and entering the defendant's properties in Maysville and was sentenced to a year in the Kentucky State Penitentiary. Chester W. Kimble had been indicted on September 7, 1959 and the date of his judgment and commitment was October 16, 1959.

XXXVIII. The said Chester W. Kimble was also indicted on September 7, 1959 for assault and battery of Eugene Wenz of Louisville, Kentucky which occurred at the scene of and during the course of the house-breaking above mentioned. The trial of Chester W. Kimble and the verdict took place, for the assault and battery, after his release from the State penitentiary and was dated September 29, 1960. He was found guilty on that day and the Court fined him $400.00.

XXXIX. Revenue agent Donald Whalen made an examination of the Federal income tax returns of aforesaid Eugene Wenz for the years 1956, 1957 and 1958. Agent Whalen began this examination sometime about Decem

ber, 1959 and the examination continued until about July, 1960. Mr. Wenz was later notified that his returns were correct as filed.

[fol. 16] XXXX. The said Chester W. Kimble and the said Archie G. Kimble of 2587 E. Burnett Avenue, Louisville, Kentucky are brothers.

Wherefore, the defendant prays that this answer be taken as response to the Rule herein and that said Rule be dismissed; and the defendant further prays Judgment of this Court declaring the rights and duties of this defendant and that the Court by its Judgment declare that the defendant is not required to submit to a cross-examination by the Treasury agents in connection with the years 1942 to 1953, inclusive, and to submit for examination his books and records for the same years:

1. Particularly since the Commissioner has already made an inspection of the defendant's books and records for one or more of the years 1942 to 1953, inclusive, and since the Commissioner has not notified the defendant in writing that an additional inspection is necessary (as required by I. R. C. Sec. 7605(b)—1954 Code);

2. And, since four examinations of the defendant's books and records have already been made, and since the agent was capricious and arbitrary, it would be oppressive and unreasonable to subject the defendant to a fifth examination;

3. And, since the years 1942 to 1953, inclusive, are barred by all statutes of limitations and since there are no facts to justify a reasonable suspicion that the defendant has committed fraud for any year, and since cross-examination of defendant and the proposed inspection of the books and records for these years would be an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution of the United States.

William R. Bagby, 615 First National Bank Building, I exington, Kentucky, Counsel for Defendant.

[fol. 17] *Duly sworn to by Bayard Edward Ryan, jurat omitted in printing.*

Certificate of service (omitted in printing).

IN UNITED STATES DISTRICT COURT

REPLY—Filed March 12, 1962

Comes the United States of America, by Bernard T. Moynahan, Jr., United States Attorney for the Eastern District of Kentucky, and by way of Reply to the Answer of the Defendant, Bayard Edward Ryan, interposes defenses to said Answer as follows:

First Defense.

Said Answer fails to state a defense to the plaintiff's Complaint herein.

[fol. 18] Second Defense.

All the affirmative allegations of said Answer are specifically denied.

Wherefore, the plaintiff, United States of America, demands relief in accordance with the demand of plaintiff's Complaint herein; and for all other proper relief.

Bernard T. Moynahan, Jr., United States Attorney.

Certificate of service (omitted in printing).

[fol. 19]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

AT COVINGTON

No. 1005

UNITED STATES OF AMERICA, Plaintiff,

v.

BAYARD EDWARD RYAN, Defendant.

Transcript of Evidence and Proceedings—March 12, 1962

Before: His Honor, Mac Swinford, Judge of Said Court

Appearances:

For the Plaintiff: Mr. George I. Cline, Assistant U. S. Attorney.

For the Defendant: Mr. William R. Bagby, Lexington, Kentucky.

• • • • • • •

(Reporter's note: On March 12, 1962, Civil No. 1005, United States of America v. Bayard Edward Ryan, was called, the parties were represented in person and by counsel and announced ready. The following then occurred:)

The Court: Do you want to make a statement?

OPENING STATEMENT BY MR. CLINE

Mr. Cline: Yes, if Your Honor please.

As I understand, this case, Your Honor, is one that Mr. Watson has been handling and has given me recently. There has been a complaint filed here that the defendant, Bayard Edward Ryan, was requested by the Internal Revenue people to produce certain records and documents in connection with an Internal Revenue investigation and that the defendant appeared with his attorney and on advice of [fol. 20] counsel refused to produce the records unless cer-

tain conditions were met by the agents such as showing them proof that they had reasonable grounds to believe that there was fraud involved. I understand that there was an investigation made involving the years '54 through '58 and that the agents at that time thought that they were completing the investigation but it developed it was necessary to have additional information on prior years in order to establish the beginning years for the net worth statement and for other purposes involving prior years. And it was these prior years, as I understand, that are in controversy and which has been denied—the records have been denied to the agents.

Now, there were two summonses issued, one was issued to return the information to Louisville. It later developed that there was an imposition on the taxpayer requiring him to go to Louisville, so additional correspondence was carried on relative to trying to get the information turned over voluntarily. This information was not forthcoming, so another summons was issued, the one which is involved here today, requiring the defendant to produce all books, papers, records, memoranda relating to personal business, income, expenses, etc., and it is from this summons that we contend that the taxpayer failed to produce the records and which we have asked for a show-cause order in the court at this time.

The Court: Do you care to make a statement, Mr. Bagby?

OPENING STATEMENT BY MR. BAGBY

Mr. Bagby: If Your Honor please, I would like to say that there are two reasons why we feel that this summons was not justified: First, that there does not appear from the facts which were available to the agent that there was [fol. 21] a reasonable expectation that, a reasonable possibility of fraud, and these years were all barred except by reason of fraud. These are the years 1942 to '53. And secondarily, from our viewpoint, it appeared that there was some, perhaps, bias in the matter and the taxpayer on my advice did not turn the records over because, personally, I couldn't see that there was any possibility of fraud and I had said time and again that if we couldn't agree then this

was a matter for the court to decide and, of course, having presented it then, we will follow the court.

• • • • • • •

The Court: Do you feel that anything would be accomplished by a conference with the District Attorney on this matter?

You realize the law is pretty lenient towards requiring these things to be turned over to the officers of the United States?

Mr. Bagby: Yes, Your Honor.

The Court: And it can't be done just because of an opinion that they may not show fraud. If they don't show fraud, they don't show it, but it cannot be withheld because the United States is entitled to know what it is and, of course, I want to give you a hearing under the law, but at the same time if you feel you could work it out in the nature of an agreement on it, it might save trouble and accomplish the same thing.

Mr. Bagby: Well, Your Honor, we have talked about it from time to time and we had asked for any facts that were available and, of course, I have made a study of it, myself, and I couldn't say where there were any facts at all that [fol. 22] completely—the absence of any justification to sustain fraud—

The Court: All right.

Mr. Bagby: —or a reasonable expectation. I mean that is the way I viewed it.

The Court: All right, sir.

Call your witness.

Mr. Cline: Donald Whalen.

Evidence for the Government.

DONALD WHALEN, being called as a witness in behalf of the government, first being duly sworn, testified as follows:

Direct examination.

By Mr. George I. Cline, Assistant U. S. Attorney:

Q. State your name please.
A. Donald Whalen.
Q. Mr. Whalen, where do you live?
A. I now reside at Hodgensville, Kentucky.
Q. Do you hold any official position with the United States Government?
A. Yes, I am an Internal Revenue agent with the Internal Revenue Service.
Q. As such agent, did you have occasion to make investigation of the income tax returns of Ed Ryan and Ruby Ryan?
A. Yes. I did have an occasion to make an examination.
Q. Did you make an examination of the records and income tax returns of these defendants or, rather, of these people, from 1954 through '58?
A. Yes, I did.
[fol. 23] Q. At that time did you advise Mr. Ryan or his attorney that you thought that you had completed the investigation?
A. Yes, I did so advise Mr. Bagby.
Q. Did you find at a subsequent time that it was necessary to reopen the matter?
A. Yes, I found later that the matter should be reopened.
Q. Were you required to do that by your superiors?
A. Yes, I was so required.
Q. Did you request either Mr. Ryan or his attorney to produce any books, papers, records or memoranda relating to his income during the period 1954 through 1958?
A. I did so make this request to Mr. Ryan.
Q. Was the request granted?
A. No, the request was not granted.
Q. Did—go ahead and tell in your own words now and save me asking you a lot of questions now, about what transpired after you asked Mr. Ryan for these records.

A. Well, when I asked Mr. Ryan for his records, he immediately called his attorney, Mr. Bagby, and he talked with Mr. Bagby over the telephone, which after some conversation he turned the telephone over to me to talk with Mr. Bagby and I made my request to Mr. Bagby again and he was upset about the dropping in on the taxpayer and asking him for records, and stated that he didn't feel that we were entitled to any records.

Q. Did he say why or did he indicate why you weren't entitled to them?

A. He said that we weren't entitled to the records unless we could prove fraud.

[fol. 24] Q. Now, from your investigation and your report of the years 1954 through 1958, did you determine that there was a deficiency of payment?

A. Yes, we did determine there was a deficiency.

Q. And was it necessary in your opinion as agent of the Internal Revenue Service to investigate these records for prior years, that you requested?

A. Yes. I felt it was necessary.

Q. For what purpose?

A. To determine the taxpayer's correct tax liability for those years.

Q. And would it have any bearing upon the net worth determination for the other years?

A. In that it would firm up some assets purchased in the prior years, prior to 1954.

Q. Did you advise Mr. Ryan that you as agent of the United States Government, had the right to see those records?

A. Yes, we informed Mr. Ryan of that.

Q. Now, Mr. Whalen, after you failed to receive the records, did you issue a summons to the defendant, to Ed Ryan, the defendant in this case?

A. Yes, we did issue a summons.

Q. I will ask you whether or not this is the original of the summons that you had served on Ed Ryan and Ruby Ryan?

The Court: Mr. Cline, do you have a copy of the statute there?

Mr. Cline: No, sir. It is in the office I believe.

(Reporter's note: A document was handed to the witness.)

Q. Mr. Whalen, what did that summons require the defendant, Ed Ryan, to do?

[fol. 25] A. This summons required Mr. Ryan to produce books and records from which we could make an examination of his income tax returns.

Q. And did he respond according to that summons?

A. Well, Mr. Ryan and his wife did appear with their representative on the date and time appointed, but the books and records were not tendered and the taxpayers were not interviewed by myself at that time.

Q. Were they accompanied by their attorney on that visit?

A. They were accompanied by their attorney.

Q. And did you again request that they turn over to you the books and papers, evidence—or documents purporting to show their income for these years?

A. We did request whether they were going to comply with the summons or not.

Q. And what answer did they give?

A. Mr. Bagby said that if—he would tender the taxpayers for questioning and also the records provided that we would make known to him certain facts which in his own mind would show suspicion of fraud and if we could do that then the records and taxpayers would be made available.

Q. Now, is that the usual procedure for you to do that, before you are shown any records?

A. No. We felt that this was an unusual request, because of the fact that Mr. Bagby would have to—would evaluate these facts and then he would make a decision whether the fraud—whether we had shown reasonable grounds for fraud or not.

Mr. Cline: I see. You may ask him.

[fol. 26] Cross examination.

By Mr. William R. Bagby,
Counsel for the Defendant:

Q. Did you say that demand for the books and records '42 to '53 had the purpose of a foundation for the years 1954 to '58?

A. Well, that would be in the nature of a secondary purpose.

Q. It was a purpose?

A. There was a purpose, yes.

Q. Was it your purpose then to attempt to arrive at a criminal prosecution for the years '54 to '58?

A. No.

Q. In other words, you were just seeking for the civil tax liability?

A. For the years '42 through '58.

Q. And your purpose is not for criminal prosecution?

A. No.

Mr. Cline: If Your Honor please, I don't believe that would make any difference what—whether it was for the purpose of civil or criminal liability.

The Court: Well, of course, that comes on the final determination of the question. Do you have any further proof?

Mr. Cline: Just a minute.

(Reporter's note: There was a short pause while counsel for the government conferred.)

Mr. Cline: Yes. We would like to call Mr. Roberts.

The Court: All right. Stand aside.

Mr. Bagby: Your Honor, may I question the witness further?

The Court: Oh, excuse me. I thought you were through. [fol. 27] Go ahead.

Mr. Bagby: I am sorry.

The Court: Go ahead.

Q. When did the examination for the years 1957 and '58 begin, Mr. Whalen?

A. On January the 25th, 1960.

Q. What—how did it happen, how did this examination happen to Ryan for those years 1957 and 1958?

Mr. Cline: Your Honor, I want to object here. The answer filed by the defendant indicates they are seeking some information about the source of some confidential information of these agents which they are not privileged to—they are not at privilege to divulge, and we would like to not have that gone into. This year, I don't think it is of any importance to the case.

The Court: Read the question.

(Reporter's note: The last question was read by the reporter.)

The Court: I don't understand the question. How did it happen? You will have to reframe the question.

Are you asking why was he examining—

Q. How—why did—why did the examination commence in the first place? In other words, was this the result of an informer—I am not asking the name of the informer—was this the case of information or was this the case of routine examination?

The Court: I sustain the objection. He doesn't have to answer. In other words, he is a government investigator on income tax matters and he doesn't have to state why, only to say that he was just examining people relative to their income tax and that was one of them.

Q. Where did you live at the time this examination began, Mr. Whalen?

[fol. 28] A. At 2585 East Burnett Street, Louisville, Kentucky.

Q. Did you have a neighbor by the name of Archie Kimble?

Mr. Cline: Object, Your Honor, for the same reason.

The Court: Objection overruled. He can state whether he had a neighbor by the name of Archie Kimble.

A. Yes, I had a neighbor by the name of Archie Kimble.

Q. Did you know his brother, Chester Kimble?

A. Yes, I knew his brother Chester Kimble.

Q. Did you at any time ask Archie Kimble or Chester Kimble to go secure some books and records from Trap & Field Magazine, in Indianapolis, Indiana?

The Court: Objection sustained.

Q. Mr. Whalen, what training in accounting have you had?

A. I had accounting in college.

Q. How long have you been with the Treasury?

A. Approximately four years.

Q. As of the present time?

A. As of the present time.

Q. At the time you began this examination, you had been in the Treasury two years?

A. Roughly, yes.

Q. How many fraud cases had you handled prior to your handling the Ryan case?

A. I don't know the exact number.

Q. You have handled some?

A. Yes, I have worked on some fraud cases.

Q. Prior to working on the Ryan case?

A. Yes.

Q. Do you know how many, one, or two or three?

[fol. 29] A. I don't recall the number. It hasn't been a large number, though.

Q. Did you work on any net worth cases prior to the Ryan case?

Mr. Cline: If Your Honor please, I want to object to the line of questioning. It is not—

The Court: Sustain the objection.

Q. You personally made the determination as to the possibility of fraud in connection with the years '42 and '53?

A. I was assisted in making this determination by my supervisor.

Q. And who was that?

A. When I say supervisor, I mean all of the higher-ups. There was—Review was in on it and the Chief of the Field Audit was in on it and my group supervisor was in on the decision.

Q. Well, was the basis of this determination the net worth that you prepared?

A. Which net worth now are you speaking?

Q. The net worth statement, was that the basis of your determination that you anticipated or suspected fraud for the years '42 to '53?

A. No, we had other information available to us at that time.

Q. And it wasn't based on net worth?

A. Well, the net worth was a factor in it. It wasn't the sole factor.

Q. Was that the way you arrived at the income?

A. That was the way we arrived at the deficiency for '54 through '58.

Q. Well, we are talking about '42 to '53.

[fol. 30] A. We used a tentative net worth to arrive at our conclusion.

Q. Do you have that net worth with you?

Mr. Cline: If Your Honor please, I want to again object.

The Court: Objection sustained. I don't think it is pertinent to the issue here, Mr. Bagby. The question—your responsibility was to show that there was no purpose at all in securing these records. Now if there is a—you are proving by this witness the very thing the government contends for, that there was a question about this income tax return and they had to, in order to determine the net worth, they had to find for certain prior years what the income was to arrive at an arbitary net worth figure.

Mr. Bagby: We would like to ask the question, Your Honor, about the different items of the net worth, if he had a net worth and based his opinion on that net worth.

The Court: That is not the issue. The question is whether or not he wrongfully asked for the records.

The statute is very clear on it:

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;"

That is what you have here.

Mr. Bagby: Well, Your Honor, these years are closed and—

[fol. 31] The Court: You carry the responsibility of showing it was not material to the inquiry. When you are talking about what he used to make up his net worth, you are talking about things that were material to the issue. There is no point in going into what these various items on the net worth were, because that is not pertinent to the issues we have before us.

Mr. Bagby: We submit, Your Honor, that we feel that we should be able to inquire into the net worth, if that was the basis of his opinion as to omitted income and his basis of fraud, that we should be able to inquire into that net worth. He would have to first—the elements of fraud, according to—as I see it—I might be wrong, I have been proven wrong before in courts and will be in the future—but as I see it, the elements of fraud, first there must be omitted income; if there is no omitted income there cannot be any omission of tax. There must be omission of tax and an intention to evade and defeat the tax and there must be an omission of income. Now, if he based that omission upon a net worth and if that net worth is just a flim-flam, then he certainly is not reasonable in his activity in asking for these books and records.

The Court: No. You are assuming something that is not a fact. He is not starting with the idea that there is a fraud. You are assuming that and he is starting with—what he wants the records for is to determine whether or not there was a fraud. That is the whole purpose of it. If he had the facts or evidence on fraud, he wouldn't need these papers, but he is attempting to determine in his examination whether or not the defendant failed to report his income tax properly and that is what he is getting the papers for.

[fol. 32] Mr. Bagby: Well, Your Honor, even if there were omissions—

The Court: What?

Mr. Bagby: Let us assume there were large omissions of income.

The Court: I know, but you want to try a case here that hasn't been made yet. That is one of the ultimate issues to be determined.

What the government has a right to do under this statute, under the regulations, is have a full disclosure by the taxpayer of his books. Then if his books, in the judgment of the tax-gatherer, in the judgment of the agents, are not sufficient to determine what that is, then he has a right to go on the net worth basis and to ascertain what that net worth was, given here, and go back several years in order to set up an arbitrary net worth.

I don't think your examination is pertinent. I sustain the objection to it.

Mr. Bagby: Well, we object, of course, Your Honor, but I feel that the—

The Court: According to your theory, nobody would ever have to show his books. The statute would be a dead letter.

Mr. Bagby: Unless there was some indication—

The Court: No, they would have to come in and according to your argument they would have to prove to the Court that the man is defrauding the government out of income tax before they get the papers to decide whether he is or not.

Mr. Bagby: No. There must be—

The Court: You are attempting to try the ultimate issue on this motion.

Mr. Bagby: No, we are not trying that, Your Honor. [fol. 33] What we mean is there must be some facts of some sort, some indications, that there was fraud.

The Court: No, absolutely not. No, sir. They can go into anybody's tax business they want to, any taxpayer, fraud or no fraud. They don't have to prove fraud before they go into it. They can ask anybody, go out there and stop the first man they meet on the street and say, "We want to see your books," and you have to let them have them.

Mr. Bagby: Then your position on that—my question is, irrespective of fraud, they have a right to look at the records?

The Court: Yes, sir. They do at all times. It may turn out not to be any fraud after they look at the records.

If they have got to prove their case before they can examine the books, there is no point in examining the books.

Mr. Bagby: Well, of course—

The Court: They are looking at the books not to establish fraud, but looking at the books to determine whether or not there is fraud. It is for the protection of the honest taxpayer. He may be just as innocent of wrong doing as far as his intent goes as possible, he may be innocent under any way, but they have a right to go to any taxpayer and ask to see his books.

Mr. Bagby: Well, I would say that they would have every right to ask for them and my position is they don't have a right to those books unless there is some factor in their hand at that time that would make them reasonably anticipate that that taxpayer had committed fraud.

The Court: They have got a factor in their hands, they have got his income tax return. That is all they need.

[fol. 34] Q. Mr. Whalen, do you have the taxpayer's income tax returns for '42 to '53? The filed income tax returns of Mr. Ryan for '42 to '53?

A. We have these returns in part.

Q. What years do you have?

A. '51, '52, and '53.

Q. Did you ever ask the taxpayer if he had any books or records for '42 to '53?

A. We asked the taxpayer to produce what records he did have for those years.

Q. You didn't ask him if he had them?

A. No, we just requested all records that he did have. If he didn't have them, naturally he couldn't produce any.

Q. You didn't ask him?

A. I don't recall whether we asked him if he had any or not. He was supposed to have had.

Q. Do you know whether or not there was any prior examination of any of the years between '42 and '53 by an Internal Revenue agent?

A. I have no knowledge that any examination was made of his books and records.

Q. I ask you if you will examine this document and tell the Court what that document is.

(Reporter's note: A document was handed to the witness.)

A. This is a document that shows an assessment of a deficiency for the year 1945 in the amount of $91.00.

Q. Examine it thoroughly and tell the Court whether or not it doesn't reveal that there was an examination made for the year 1945.

Mr. Cline: If the Court please, I want to object again to that line of questioning because I don't think it is material whether there has been one or more examinations. If the [fol. 35] government determined that they needed these records, I think they were entitled to them under the sections we cited.

The Court: Overruled.

The Witness: Would you please repeat the question again now?

(Reporter's note: The last question was read by the reporter.)

A. Yes. This document does show that there was an examination for 1945.

Q. Do you know whether—did you ever write on behalf of the Commissioner, a letter requesting a second examination of the books and records pursuant to the Internal Revenue Code?

A. No, no letter was ever written.

Q. I believe you stated that Archie Kimble lived at 2587 East Burnett Avenue, which is adjoining you?

A. Yes.

Q. Did Archie Kimble bring you a book of any kind from Indianapolis?

Mr. Cline: Object.

The Court: Overruled.

A. Yes.

Q. Did you ask him to get the book?

A. Yes.

Q. Did you ask him to sign this receipt? Do you recognize his signature, first (showing document to the witness)?

A. No. I don't recognize the signature.

Q. You don't recognize the handwriting?

A. No.

[fol. 36] Q. Is that about the date that you asked him to get that book?

A. I don't recall whether that is the day or not.

Q. Archie—do you know whether or not Archie Kimble's brother was ever involved in a controversy with Mr. Ryan?

The Court: Objection sustained.

Q. Mr. Whalen, do you—what do you consider to be the elements in fraud?

The Court: Objection sustained.

Q. Mr. Whalen, in making your determination as to fraud indication for the years '42 to '53, did you consider each year separately?

A. Only on a tentative basis.

Q. What do you mean by "tentative basis"?

A. Well, we didn't have the books and records. We only had government documents and third party information to make any determination, so naturally it couldn't be anything final.

Q. Well, you didn't have the income tax returns from '42 to '50, did you?

A. That is right.

Q. You say you didn't have the income tax returns for '42 to '50?

A. We did not.

Q. Then I ask you again, did you examine each one of these years or did you just make a general summary of all years '42 to '53?

A. Well, we tried to determine each year as nearly as we could, but it certainly couldn't be definite without the books and records.

Q. Would you say that your opinion as to the fraud was just an estimate or guess?

Mr. Cline: Object again, Your Honor.

[fol. 37] The Court: I don't think, Mr. Bagby, that the question of fraud enters into it. This statute says nothing about the agent having to believe or be suspicious of fraud. That is not an element of the law at all. "For the purpose

of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper. . . ."

In other words, it gives them the right to examine all of the available data irrespective of what they might think about fraud. What difference does it make what this agent thought? That is not the determining factor in this case. Whether he thought fraud or no fraud or whether his thinking was erroneous or whether he had nothing to base an opinion on is not the question. This is an examination to determine whether or not there was fraud.

Mr. Bagby: Would Your Honor make a difference there, where they didn't have the income tax returns?

The Court: No. It says even where they didn't file one.

[fol. 38] Q. Well, Mr. Whalen, do you have records showing whether or not Mr. Ryan filed returns for '42 to '53?

A. Yes, we have.

Q. '42 to '53?

A. Yes, we have the government document which reveals that returns were filed.

Q. That Mr. Ryan filed returns for each and every one of the years '42 to '53?

Mr. Cline: If Your Honor please, I think I can anticipate what Mr. Bagby is getting at, that the witness has answered the question that he doesn't have the return for

those years, but those of us who have been through trial of these income tax cases commonly know the Form 899, which is the summary reports which are filed away or done away with after a certain period of time.

I want to interpose again an objection and in support of that objection say that the only thing we are concerned with here is whether or not they are required to produce the records and unless he can show us a statute other than the one we have indicated to the Court, I think we are entitled to an order without taking up any more of the Court's time.

Mr. Bagby: Well, Your Honor, I would like to submit the 899 to which he has reference, as a government document and I will let Mr. Whalen examine it and see if it isn't.

Mr. Cline: I would like to see it first please.

Mr. Bagby: Certainly. I thought you had.

(Reporter's note: The document was given to Mr. Cline and then to the witness.)

Q. Now, I hand you a document that states at the top "Ed Ryan" and consists of one, two, three, four, five pages. Will you tell the Court what that document is?

[fol. 39] A. This document is a record of the tax returns filed by the taxpayer showing the amount of tax if any and the days on which it was paid.

Q. It would reveal whether or not he filed returns, too, wouldn't it?

A. Yes.

Q. Then that is for what years?

A. 1941 through 1953.

OFFER IN EVIDENCE

Mr. Bagby: Your Honor, I would like to offer this in evidence.

The Court: Give it an exhibit number.

(Reporter's note: A photostat of summary relating to Ed Ryan, 1030 Forest Avenue, Maysville, Kentucky, consisting of five pages, was marked Defendant's Exhibit 1.)

Mr. Bagby: That is all, Your Honor.

The Court: Stand aside.

Mr. Cline: That is all. The government rests, Your Honor.

The Court: The government rests.

Mr. Bagby: May I call Mr. Ryan?

The Court: Come around, Mr. Ryan.

Evidence for the Defendant.

BAYARD EDWARD RYAN, being called as a witness in his own behalf, first being duly sworn, testified as follows:

Direct examination.

By Mr. William R. Bagby,
Counsel for the Defendant:

Q. Mr. Ryan, testimony has been given that you did not turn over books and records pursuant to summons. Will you please tell the Court the basis for this failure?

A. Well, it was on advice from my attorney.

[fol. 40] Q. Mr. Ryan, I will ask you, do you have—do you know whether or not you have all the business books and records for '42 to '53?

A. I do not.

Q. Did you have a flood in 1948 in Maysville?

A. Yes, sir.

Q. Did that flood get up in your packing plant?

A. Approximately two to three feet.

Q. Did it get up into the place where you did have some of your books and records stored?

A. Yes, sir.

Q. And you did lose some of your books and records at that time?

A. Yes, sir.

Mr. Bagby: That is all.

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WALLACE ISOM, being called as a witness in behalf of the defendant, first being duly sworn, testified as follows:

Direct examination.

By Mr. William R. Bagby,
Counsel for the Defendant:

Q. Mr. Isom, are you employed by Mr. Ryan?
A. Yes, sir.
Q. How long have you been employed?
A. Since June '48.
Q. Do you keep his books and records?
A. Yes, sir.
Q. Do you know whether or not all the books and records are available for the years '42 to '53?
A. I have never been able to locate them.
[fol. 41] Q. You do have some records for some of those years, do you not?
A. Yes, sir, partial.
Q. Tell the Court what years you do have records for.
A. Well, I would say partially '47 and '48 and the rest pretty well complete.
Q. In other words, you do have records for '48, '49, '50, '1, '2, and '3?
A. Yes, sir. On up through there.
Q. Do you know where those records are now?
A. Sir?

* * * * * * *

Q. I will ask you if you have seen this document before (handing document to the witness)?
A. Yes, sir, I have.
Q. Does that state that it is a notice of setting the case for trial?
A. Yes, sir.

OFFERS IN EVIDENCE

Mr. Bagby: I would like to offer this, Your Honor, in evidence.
The Court: Let it be filed.

(Reporter's note: A copy of a document, styled "Notice Setting Case For Trial, Ed Ryan and Mary H. Ryan v. Commissioner of Internal Revenue," was marked Defendant's Exhibit 2.)

Q. I would like to ask you, Mr. Isom, if you know whether the years 1954, '55, '57 and '58 are now pending with the Treasury Department?

A. Yes, sir, they are.

Q. Have you seen that document before: I will ask [fol. 42] you this, did I show you that document up in the hotel room?

A. Yes, sir.

Q. And this is correspondence with respect to a conference about the years '54, '55, '57 and '58?

A. That's right.

Q. And the conference was set for March the 2nd, 1962?

A. That's right.

Mr. Bagby: I would like to offer that in evidence, Your Honor.

The Court: Let it be filed.

Mr. Bagby: That is all, Your Honor.

(Reporter's note: A letter dated February 23, 1962, to Mr. William R. Bagby, from J. R. Sharman, Internal Revenue Service, was marked Defendant's Exhibit 3.)

Cross examination.

By Mr. George I. Cline,
Assistant U. S. Attorney:

Q. Mr. Isom, you say you have been bookkeeper for how long for Mr. Ryan?

A. Since June '47.

Q. Prior to the time you were bookkeeper, do you know who was bookkeeper?

A. Not positive, no, sir. There have been several, I think.

Q. Now, I believe you say that there are some records of account having to do with the income of Mr. Ryan for the years from '47 through '53?

A. Yes, sir.

Q. Do you know where the records are?

A. Yes, sir.

Q. Has Mr. Ryan requested you to turn them over to [fol. 43] him so that he might in turn deliver them to the Treasury Department?

A. They are in Mr. Bagby's office.

Q. They are in Mr. Bagby's office?

* * * * * * *

Mr. Bagby: Call Mr. McConnaughey.

JOHN R. MCCONNAUGHEY, being called as a witness in behalf of the defendant, first being duly sworn, testified as follows:

Direct examination.

By Mr. William R. Bagby,
Counsel for the Defendant:

Q. Where do you live, Mr. McConnaughey?

A. My residence is in Indianapolis, Indiana.

Q. What was your occupation in 1960?

A. I was editor and manager of a magazine concerning shotgun shooting.

Q. Did you have occasion to have a visitor come to your office in 1960?

A. I did.

Q. Do you recall whether or not a person representing himself to be Archie Kimble came to your office in 1960?

A. He did.

Q. Will you examine this document and state the facts concerning this document (handing document to the witness). What is that document?

A. It is a receipt that I asked Mr. Kimble to sign when he requested a bound volume of a year's issues of our magazine. I asked him to specify in this the volume number, the months that were covered.

[fol. 44] Q. How do you know it was Mr. Kimble?

A. He identified himself by a card such as a government employee might bear or any other industrial employee. The card had his photograph on it.

Q. And he borrowed the book?

A. That's right.

Q. And did he give you that receipt for the book?

A. He then gave me this receipt before he left my office.

Q. Had you ever seen him before?

A. Never.

OFFER IN EVIDENCE

Mr. Bagby: I would like to offer this in evidence, Your Honor.

The Court: Let it be filed.

(Reporter's note: A handwritten receipt for Vol. 134, Trap & Field magazine, purportedly signed by Archie G. Kimble, was marked Defendant's Exhibit 4.)

Q. Was that book returned to your office?

A. It was returned, yes, sir.

Q. How was it returned?

A. By mail.

Q. Was there correspondence with it?

A. There was a note in it, thanking me for the use of the book and saying that possibly further copies would be desired of other years.

Q. Was there a signature on that letter?

A. The signature was Mr. Whalen.

Q. You don't know his handwriting, do you?

A. I do not.

Q. You just recall that that was the name that was on the message that came to you?

A. Plus the fact that Mr. Kimble here also wrote Mr. [fol. 45] Whalen's name and indicated to me that the book would be returned by the Internal Revenue Bureau.

Mr. Bagby: That is all, Your Honor.

The Court: Cross-examine.

Mr. Cline: No questions.

MRS. INEZ RASH, being called as a witness in behalf of the defendant, first being duly sworn, testified as follows:

Direct examination.

By Mr. William R. Bagby,
Counsel for the Defendant:

Q. Were you requested, Mrs. Rash—are you holding some temporary position with the Mason Circuit Court?
A. Yes, sir, I am.
Q. What position is that?
A. Deputy Circuit Clerk.
Q. Were you requested to bring certain documents with you?
A. Yes, I was.
Q. Do you have those now?
A. Yes, I do.

(Reporter's note: The documents were given to Mr. Cline.)

Mr. Cline: If Your Honor please, may we approach the bench?
The Court: Yes, sir.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of other persons in the courtroom:)

Mr. Cline: If Your Honor please, this—he is proposing to introduce here some warrants charging this Kimble with [fol. 46] breaking into the office. I don't think there is any point in this trial and I don't see why he wants to bring those up.

The Court: What is your defense, Bill? What do you contend for? I want to give you every opportunity to make that motion and get all the evidence in, but there is no way to get around that statute unless you have got something positive that you want to show, that you didn't have records or that they are in some other court or somebody stole them or whatever it was. This is not a punishment proceedings. He is not asking that he be punished, he is just trying to get the records.

Mr. Bagby: Right. We don't have all of the records for those years, which has been brought out clearly, and of course, one year they didn't ask for because they made a prior examination. As I say, I may be wrong about the law in the thing, but I believe in Judge Ford's court he said if there was no prejudice shown and if there had been any possibility, it was a different situation with respect to demanding books and records for years that are barred except by fraud.

In other words, we say all these years are barred. Now, we gave them all the records for the open years and for the years '54 and '55, which were not open under the three-year statute. They were open under the 25% omission, but not under the three years. Now, these years are all barred and if there was—

The Court: They are barred from prosecution but not barred from evidence for the government. That is the whole thing.

Mr. Bagby: For civil liability they are not unless—.

The Court: Civil liability would cover those years, but not to establish a base.

[fol. 47] I don't think there is any question as the record now stands but that the Court would have to enter an order directing that they turn over the records which you have.

These are just some warrants from the Commonwealth of Kentucky. I sustain the objection to those.

Mr. Bagby: May we make an offer of proof?

The Court: Yes. You may if you want to offer them.

Mr. Bagby: I would like to, yes.

The Court: Let them be offered as an avowal of the witness.

(Reporter's note: Two indictments in the Mason Circuit Court, The Commonwealth of Kentucky against Chester Kimble, were marked Defendant's Exhibit 5 for identification, as an avowal.)

* * * * * * *

The Court: That is an explanation of why. If you want to plead, in other words, "We will turn them over. We can't do it right now," or something like that, but as it stands now you are questioning the right of the government to have them at all.

Mr. Bagby: Yes, that is our foundation. Our basis is that we feel that there should be some reasonable basis for belief that there has been fraud committed in these years before they have a right to them. Now, that is our primary position.

The Court: Is that your primary position?

Mr. Bagby: We may be wrong, I say.

The Court: I don't think you are right. I think the [fol. 48] only thing they have to show is that they were making an investigation, they had the income tax returns or they didn't have any when there should have been some.

* * * * * * *

Mr. Bagby: I would like the opportunity to ask Mr. Whalen one question.

The Court: All right. Come back, Mr. Whalen.

DONALD WHALEN, having previously been called as a witness in behalf of the plaintiff and being duly sworn, was recalled for further cross-examination as follows:

Cross examination.

By Mr. William R. Bagby,
Counsel for the Defendant:

Q. Mr. Whalen, I believe you said you knew Mr. Archie Kimble?

A. Yes.

Q. And you know Mr. Chester Kimble?

A. Yes.

Q. And you do know they are brothers?

A. Yes.

Mr. Bagby: That is all, Your Honor.

The Court: Stand aside.

Do you want to be heard?

Mr. Bagby: That is all.

The Court: Do you want to be heard?

Mr. Cline: No, sir, Your Honor. We were contemplating calling a witness in rebuttal but the government rests.

RULING OF THE COURT

The Court: The complaint in this case asks that the defendant Ryan be ordered to appear before the court and show cause why he should not be compelled to obey the summons mentioned hereinabove and that he be compelled [fol. 49] to obey such summons and the court should take all proper additional action to require obedience to said summons and for all proper relief.

Now, the Court is of the opinion under this statute and the regulations pursuant to the statute that this taxpayer has to reveal to the agent his books and records that he is asked for. Of course, if they are not available because they are in some other court, or for any other reason, he has a right to give that as an excuse for not producing them at the time they are requested, but it is the order of the Court, and you may draw a judgment of the Court, directing him to produce these records to the agent according to the prayer of the complaint, which is in conformity with this Section 7602, statutory provision, and that will be the ruling of the Court.

• • • • • • •

[fol. 50]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT No. 1.

(See opposite) ☞

NAME OF TAXPAYER			ADDRESS (Number, street, city, and State)				CLASS OF TAX	DATE OF NOTICE
Ed Ryan			1039 Forest Avenue Haysville, Kansas				XX	January 26, 1962
TAXABLE PERIOD (a)	ACCOUNT NUMBER (b)	RECEIVED OR SCHEDULED DATE (c)	DESCRIPTION (d)	LIABILITY AND (ABATEMENT) (e)	PAYMENTS AND CREDITS APPLIED (f)	BALANCE (g)	REFUNDS AND CREDITS ALLOWED (h)	SUPPLEMENTAL INFORMATION (i)
1961	HK 703198		Non-taxable					
1962	171095	3/15/63 6/15/63 12/31/63	Withheld	101.59	25.40 25.00 51.19	76.19 51.19 -0-		
1963	3042242 8842346	10/30/63 1/31/64	Estimated Tax	25.48 25.47 50.95	25.48 25.47 50.95			Ed Ryan & Ruby R.
1963	890579	3/15/64		170.62	170.62	-0-		
1964	3033758 8886537 860.520	5/15/64 6/30/64 9/30/64	Estimated Tax	66.09 66.08 132.18 264.35	66.09 66.08 132.18 264.35			
1964	3007353	3/15/65		278.65	278.65	-0-		

[fol. 51]

(See opposite) ☞

NAME OF TAXPAYER			ADDRESS (Number, street, city, and State)				CLASS OF TAX	DATE OF REQUEST
[redacted] 1945 - 1947 [redacted] & Mary E. [redacted] 1948 - 1955			See addresses in column (1)				IT	[redacted] January 26, 1962
TAXABLE PERIOD (a)	ACCOUNT NUMBER (b)	RECEIVED OR SCHEDULED DATE (c)	DESCRIPTION (d)	LIABILITY AND (ABATEMENT) (e)	PAYMENTS AND CREDITS APPLIED (f)	BALANCE (g)	REFUNDS AND CREDITS ALLOWED (h)	SUPPLEMENTAL INFORMATION (i)
1945			Estimated tax					No record
1945	7906885		Refund/Credit No prepayments					Unable to certify
1946 Jan.	11/48 [redacted]	11/48 11/12/48	Interest	91.00 14.56	105.56	105.56 -0-		(1) P. O. Box 14 Hyndville, Kentucky
1946			Estimated tax					No record
1946	5/47 300097	5/14/47 6/19/47 10/6/47 8/27/47	Interest Penalty (Int. By Govr.)	158.00 1.58 7.90	158.00 1.58 7.90	1.58 -0- 7.90 -0-		Extension to 4/15/48 (1) Blue Run Road Hyndville, Kentucky
1947	1506379	1/13/48	Estimated tax	158.00	158.00	-0-		(1) Blue Run Road Hyndville, Kentucky

[fol. 52]

(See opposite) ☞

NAME OF TAXPAYER: Ed Ryan. 1945 - 1947; Ed & Mary H. Ryan 1948 - 1955

ADDRESS (Number, street, city, and State): See addresses in column (i)

CLASS OF TAX: IV

DATE OF REQUEST: January 26, 1962

TAXABLE PERIOD (a)	ACCOUNT NUMBER (b)	RECEIVED OR SCHEDULED DATE (c)	DESCRIPTION (d)	LIABILITY AND (ABATEMENT) (e)	PAYMENTS AND CREDITS APPLIED (f)	BALANCE (g)	REFUNDS AND CREDITS ALLOWED (h)	SUPPLEMENTAL INFORMATION (i)
1947	5/48 300819	5/15/48 6/23/48	Interest	2302.37 23.03	2302.37 23.03	23.03 -0-		Extension to 5/15/48 (Ed) Nine Mile Road Maysville, Kentucky
1948?	10000896	6/18/48 9/13/48	Estimated tax	559.74 1119.48 1679.22	559.74 1119.48 1679.22			(Ed + Mary H.) Nine Mile Road Maysville, Kentucky
1948	3011498	1/26/49		2269.02	2269.02			(Ed + Mary Helen) Nine Mile Road
1949	1028532	4/18/49 6/16/49 9/19/49 12/7/49	Estimated tax	942.18 942.18 942.18 942.18 3768.72	942.18 942.18 942.18 942.18 3768.72			(Ed + Mary H 1301 Forest Avenue Maysville, Kentucky
1949	9011139	5/17/50	Credited to 1950 Estimated				571.08	(Ed + Mary Helen) Nine Mile Road Maysville, Kentucky

[fol. 53]

(See opposite) ☞

NAME OF TAXPAYER	ADDRESS (Number, street, city, and State)	CLASS OF TAX	DATE OF REQUEST
Ed Ryan 1945 - 1947 Ed & Mary E. Ryan 1948 - 1955	See addresses in column (1)	IT	January 26, 1962

TAXABLE PERIOD (a)	ACCOUNT NUMBER (b)	RECEIVED OR SCHEDULED DATE (c)	DESCRIPTION (d)	LIABILITY AND (ABATEMENT) (e)	PAYMENTS AND CREDITS APPLIED (f)	BALANCE (g)	REFUNDS AND CREDITS ALLOWED (h)	SUPPLEMENTAL INFORMATION (i)
1950	1023332	4/20/50	Estimated tax	228.33	228.33			(EC + Virginia, N.H.Ind.)
			Credit claimed	571.68	571.68			Rive Sun Road
		6/29/50	●	799.41	799.41			Bayville, Kentucky
		9/11/50		799.41	799.41			
		1/2/51		799.41	799.41			
		1/22/51		284.16	284.16			
				[illegible]	[illegible]			
1950	3020746	3/26/51		340.16	340.16	-0-		(Ed + Mary N)
1951	1023888	3/26/51	Estimated tax	980.99	980.99			Rive Sun Road
		6/11/51		980.99	980.99			Bayville, Kentucky
		9/20/51		980.99	980.99			
		1/5/52		680.99	680.99			
				[illegible]	[illegible]			
1951	AF 18385	3/31/52		262.00	262.00	-0-		(Ed + Mary)
1952	EP 31364	3/18/52	Estimated tax	1173.07	1173.07			Ed + M. N.)
		6/20/52		1173.07	1173.07			Rive Sun Road
		9/24/52		1173.08	1173.08			Bayville, Kentucky
		12/12/52		1173.08	1173.08			
				[illegible]	[illegible]			

[fol. 54]

(See opposite) ☞

NAME OF TAXPAYER
Ed Ryan 1955 - 1957
Ed & Mary E. Ryan 1958 - 1959

ADDRESS (Number, street, city, and State)
See addresses in column (1)

CLASS OF TAX
IT

DATE OF REQUEST
January 26, 1962
[redacted]

TAXABLE PERIOD (a)	ACCOUNT NUMBER (b)	RECEIVED OR SCHEDULED DATE (c)	DESCRIPTION (d)	LIABILITY AND (ABATEMENT) (e)	PAYMENTS AND CREDITS APPLIED (f)	BALANCE (g)	REFUNDS AND CREDITS ALLOWED (h)	SUPPLEMENTAL INFORMATION (i)
1952	AF 700868	3/25/53		6140.74	6140.74	-0-		(Ed - mail)
1953	AF 39523	3/18/53	Estimated tax	2688.01	2688.01			Elmer Ryan Road
		6/15/53		2688.01	2688.01			Edgerville, Kentucky
		10/22/53		2688.01	2688.01			
		12/18/53		[illegible]	[illegible]			
				[illegible]	[illegible]			
1953	AF 1008888	3/30/54		993.12	993.12	-0-		

[fol. 55]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT NO. 2

TAX COURT OF THE UNITED STATES

Washington

January 11, 1962

ED RYAN and MARY H. RYAN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No.: 87907

Trial On: April 16, 1962

Trial At: Courtroom No. 3
United States District Court
Room 842, U. S. Post Office and
Courthouse Building
Cincinnati, Ohio

NOTICE SETTING CASE FOR TRIAL.

Take Notice that the above-entitled case is set for trial before a Division of the Tax Court of the United States as indicated above.

The calendar for that Session will be called at 10:00 A.M. on the date indicated and you will be expected to answer the call at that time and be prepared when the case is reached for trial. Failure to appear will be taken as cause for dismissal in accordance with Rule 27(b)(3) of the Court's Rules of Practice.

You are expected to be familiar with the Court's Rules of Practice in all other respects.

Your attention is called particularly to Rule 31(b) which requires that the parties stipulate facts and evidence to

[fol. 56] the fullest possible extent prior to the call of the calendar. You should confer with your adversary promptly in order to comply with that rule.

(s) HOWARD P. LOCKE,
Clerk of the Court.

Ex parte motions for continuance of trial, filed 30 days or less prior to the first day of the Session will be calendared for hearing at calendar call at the Session unless the Court, in its discretion, directs otherwise in exceptional circumstances.

To: William R. Bagby, Esq.
615 First National Bank Building
Lexington, Kentucky

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT NO. 3

U. S. TREASURY DEPARTMENT
Internal Revenue Service
Office of Regional Commissioner

February 23, 1962

In Reply Refer To
AP:CI:JRS

Mr. William R. Bagby
615 First National Bank Building
Lexington, Kentucky

Dear Mr. Bagby:

Subject: Ed and Mary Ryan
Maysville, Kentucky
Federal income tax liability
Years: 1954, 1955, 1957, and 1958

We have received this case for hearing as a result of the request made to the District of Internal Revenue.

Accordingly, a conference has been scheduled for 2:00 p.m., on March 2, 1962, to be held at 818 Enquirer Building, [fol. 57] 617 Vine Street, Cincinnati 2, Ohio. It is the desire of this office to make disposition of the case at the earliest practicable date. Your cooperation in attaining that objective will be appreciated.

At this conference you will be afforded an opportunity to present, in an informal manner, facts, arguments, and legal authorities in support of your contentions. Any material facts or evidence upon which you rely and which have not been made a matter of record in the case should be submitted to this office in verified or affidavit form at least five days prior to the conference.

Future correspondence in this case should be directed to the attention of Mr. J. R. Sharman, the Technical Advisor to whom this case has been assigned, or he may also be contacted by telephone, DUnbar 1-2200, Ext. 1403.

Very truly yours,

(s) J. R. SHARMAN
Technical Advisor, Appellate
Cincinnati Region

[fol. 58]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT NO. 4

TRAP
FIELD

Official Magazine
Amateur Trapshooting Association
3516 North College Avenue
Indianapolis 5, Indiana

I hereby acknowledge receipt of Vol. 134, Trap & Field, Jan.-Dec. 1958 for Internal Revenue purposes only.

To be returned week of April 4, 1960.

Internal Revenue Dept.
Federal Building
Louisville, Ky.

Archie G. Kimble
or Donald Whalen
2587 E. Burnett Ave.
Louisville 17, Ky.

[fol. 59]

IN UNITED STATES DISTRICT COURT

DEFENDANT'S EXHIBIT NO. 5

THE COMMONWEALTH OF KENTUCKY

Mason Circuit Court

Term, 1959

THE COMMONWEALTH OF KENTUCKY,

against

CHESTER KIMBLE.

INDICTMENT

The Grand Jury of Mason County, in the name and by the authority of the Commonwealth of Kentucky, accuse Chester Kimble of the crime of Assault and Battery, committed in manner and form as follows, to-wit:

The said defendant Chester Kimble in the said county of Mason, on the 26th day of April A. D. 1959, and before the finding of this indictment with force and arms did unlawfully, willfully, feloniously, made a violent assault with His hands, fists and feet upon the person of one Eugene Wenz did strike, beat and kick on and upon his head, body, arms, limbs and person, thereby inflicting upon the head, body, arms, limbs and person of said Eugene

Wenz divers bruises, hurts and wounds, against the peace and dignity of the Commonwealth of Kentucky.

(s) Woodson T. Wood,
Commonwealth Attorney,
19th Circuit Court District of Kentucky.

[fol. 60] Witnesses:

Ed Ryan
C. T. Cotterill
Chester Harp

No. 1236

Commonwealth
of Kentucky

Indictment for

vs.

Assault & Battery
Mason Circuit Court,

Chester Kimble

A True Bill

(s) Mrs. Laurence Cline
Foreman of Grand Jury

Presented by the foreman, in the presence of the Grand Jury, to the Court and filed in open Court, this 7th day of September, 1959.

C. L. Clift, Clerk,
Mason Circuit Court,

By: R. M. Pfeffer, D. C.

Bail $2500.00

[fol. 61]

COMMONWEALTH OF KENTUCKY

19th Judicial District

Mason Circuit Court

Indictment No. 1236

COMMONWEALTH OF KENTUCKY, Plaintiff,

v.

CHESTER KIMBLE, Defendant.

TRIAL AND VERDICT

On the call of the trial docket, came the plaintiff, with W. T. Wood & H. L. Wood, of counsel, and the defendant, with J. M. Collins and Philip Hargett, of counsel, waived arraignment, and announced ready for trial, pleading "not guilty" to the indictment charging Assault and Battery.

Stenographer to report the trial was requested by defendant.

Thereupon came the following jury, to-wit:

1. Carl Jobst
2. Horace Clarke
3. Tebbie Lewis
4. Harry Galbraith
5. Mrs. William Bradley
6. Mrs. J. D. Chandler
7. Agnes Cracraft
8. Mrs. Robert Hutchison
9. Paul Brothers
10. Mrs. A. D. Gault
11. Mrs. Jack Estill
12. Ed Bailey

who were duly empaneled according to law and sworn to try the cause.

Motions and rulings made during trial were as follows (see reverse):

The jury aforesaid after having fully heard all the evidence and the instructions of the court, and the arguments

[fol. 62] of counsel, retired to their room, and returned into court the following verdict:

"We the jury acting pursuant to Instruction #1, find the defendant, Chester Kimble, guilty, and fix his penalty at $400.00 fine.

(s) PAUL G. BROTHERS,
Foreman."

Wherefore, It Is Now Ordered And Adjudged, that there being no legal cause to the contrary shown, judgment in accordance with the verdict aforesaid shall issue according to law, and the Commonwealth recover $400.00 from the defendant and $33.00 costs which is paid and satisfied, defendant discharged from custody.

(s) JOHN A. BRESLIN, JR.
Judge.

Date 29 Sept. 1960.

Copy Attest: Order Book 98, Page 163
C. L. Clift, Clerk;
(s) R. M. PFEFFER, D.C.

(Reverse)

1. Demurrer to indictment, waived hearing, overruled.
2. Plea of double jeopardy former conviction, heard, overruled, with leave to move for arrest of judgment in event of conviction, exception.
3. Motion for directed verdict at conclusion of Commonwealth's case, hearing waived, overruled.
4. Motion by defendant for peremptory instruction at close of whole case, waiving hearing, overruled.
5. Objection to jury being being allowed to take indictment and exhibits to jury room during deliberation, overruled pursuant to Section 248 Criminal Code.

[fol. 63] I, R. M. Pfeffer, do certify that I am the Deputy Circuit Clerk of the Mason Circuit Court, and as such have

the official custody of the records of said court, it being a constitutional court of record with seal, and that I do by these presents delegate Inez E. Rash as a deputy Circuit Clerk to present the certified copies of the Indictment, Trial & Verdict, & Judgment & Committment in Case No. 1235 & 1236, Commonwealth of Kentucky of Kentucky vs. Chester Kimble, to the United States Court for the Eastern District of Kentucky, Covington Division.

Witness my hand and the seal of this office this 10 day of March, 1962.

C. L. Clift, Clerk,
Mason Circuit Court,
(s) R. M. Pfeffer, D. C.,
Mason Circuit Court.

I, Inez E. Rash, Deputy Circuit Court Clerk of the Mason Circuit Court do hereby certify that I am the Official Custodian of the Record No. 1235 & 1236 in the Mason Circuit Court and that the foregoing is a full, true, and exact copy of the Indictment No. 1235 & 1236, Commonwealth of Kentucky vs. Chester Kimhle Trial & Verdict and Judgment & Commitment as same appears in the record of the Office of the Mason Circuit Court.

Witness my hand and seal this the 10 March, 1962.

C. L. Clift, Clerk,
Mason Circuit Court,
By: (s) Inez E. Rash, D. C.

[fol. 64]

THE COMMONWEALTH OF KENTUCKY

Mason Circuit Court

September Term, 1959

THE COMMONWEALTH OF KENTUCKY,

against

CHESTER KIMBLE.

INDICTMENT

The Grand Jury of Mason County, in the name and by the authority of the Commonwealth of Kentucky, accuse Chester Kimble of the crime of unlawfully and feloniously breaking and entering into an office of another, with intent to steal therefrom, and unlawfully feloniously taking, stealing and carrying away therefrom articles of value, the property of another, committed in manner and form as follows, to-wit:

The said defendant Chester Kimble in the said county of Mason, on the 26th day of April 1959, A. D. 1959, and before the finding of this indictment, did unlawfully, willfully, feloniously, did break and enter into an office, located in the building and on the farm of Ed Ryan, near Lewisburg, Kentucky, with the felonious intent to take, steal and carry away therefrom articles of value, and did then and there unlawfully and feloniously take, steal and carry way therefrom lawful United States and coin and currency of the value of Over Seven Thousand Dollars, the property of Ed Ryan with the fraudulent intent then and there to convert the same to his own use, and to permanently de-

[fol. 65] prive the said owner of his property therein, contrary to the form of the statute in such cases made and pro-

vided, and against the peace and dignity of the Commonwealth of Kentucky.

(s) WOODSON T. WOOD,
Commonwealth's Attorney,
19th Circuit Court District of Kentucky.

Witnesses:

Ed Ryan
C. T. Cotterill
Chester Harp

No. 1235

COMMONWEALTH
OF KENTUCKY
Indictment for
vs.
House Breaking
CHESTER KIMBLE

A True Bill

Mrs. Laurence Cline
Foreman of Grand Jury

Presented by the foreman, in the presence of the Grand Jury, to the Court and filed in open Court, this 7th day of September, 1959.

C. L. Clift, Clerk,
Mason Circuit Court.

Bail $5000.00

[fol. 66]

COMMONWEALTH OF KENTUCKY

19th Judicial District

Mason Circuit Court

Indictment No. 1235

COMMONWEALTH OF KENTUCKY, Plaintiff,

v.

CHESTER KIMBLE, Defendant.

TRIAL AND VERDICT

On the call of the trial docket, came the plaintiff, with Woodson T. Wood and Houston L. Wood, of counsel, and the defendant, with J. M. Collins and Philip Hargett, of counsel, and announced ready for trial.

Stenographer to report the trial was requested by defendant.

Thereupon came the following jury, to-wit:

1. Mrs. John W. Clarke
2. Mrs. Lewis Kilgus
3. Donald Stapleton
4. Mrs. Elmer Tincher
5. James Browning
6. P. B. Youngman
7. Mrs. Richard Gaither
8. Henry Collins
9. Robert Willocks
10. W. E. Estill
11. Mrs. H. N. Parker
12. Mrs. Albert Manion

who were duly empaneled according to law and sworn to try the cause.

The jury aforesaid after having heard all the evidence and the instructions of the court, and the arguments of counsel, retired to their room, and returned into court with the following verdict:

[fol. 67] "We the jury find the defendant guilty under instruction No. #2 and fixed the penalty at one year in the penitentiary.

(s) ROBERT B. WILLOCKS,
Foreman."

Wherefore, It Is Now Ordered And Adjudged, that there being no legal cause to the contrary shown, judgment in accordance with the verdict aforesaid shall issue according to law.

(s) JOHN A. BRESLIN, JR.,
Date October 14, 1959. Judge.

Copy Attest: Order Book 97, Page 579
C. L. Clift, Clerk,
(s) R. M. PFEFFER, D.C.

[fol. 68]

COMMONWEALTH OF KENTUCKY
19th Judicial District
Mason Circuit Court,
September Term, 1959
Indictment No. 1235

COMMONWEALTH OF KENTUCKY, Plaintiff,

v.

CHESTER KIMBLE, Defendant.

JUDGMENT & COMMITMENT

On this 16 day of Oct., 1959, came the attorney for the Commonwealth, and the defendant appeared in person with J. M. Collins & Philip Hargett, his counsel, and it appearing that defendant has been tried (by jury) (by Court) with agreement of his counsel, and been found guilty. It Is Adjudged that the defendant has been convicted upon his

plea of not guilty, of the offense of Breaking into an office, as charged, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Sheriff of this county for imprisonment for a period of One (1) Year.

[fol. 69] It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the Sheriff, and that the copy serve as the commitment of the defendant.

The Court recommends commitment to: La Grange Reformatory, La Grange, Kentucky.

(s) JOHN A. BRESLIN, JR.,
Circuit Judge.

Date: 16 October 1959.

A True Copy: Order Book 97, Page 581.
Certified this 16 day of Oct., 1959.

C. L. Clift, Clerk,
By: R. M. Pfeffer, Deputy Clerk.

I, R. M. Pfeffer, do certify that I am the Deputy Circuit Clerk of the Mason Circuit Court, and as such have the official custody of the records of said court, it being a constitutional court of record with seal, and that I do by these presents delegate Inez E. Rash as a deputy Circuit Clerk to present the certified copies of the Indictment, Trial & Verdict, & Judgment & Commitment in Case No. 1235 & 1236, Commonwealth of Kentucky of Kentucky vs. Chester Kimble, to the United States Court for the Eastern District of Kentucky, Covington Division.

Witness my hand and the seal of this office this 10 day of March, 1962.

C. L. Clift, Clerk,
Mason Circuit Court,
(s) R. M. PFEFFER, D. C.
Mason Circuit Court.

[fol. 70] I, Inez E. Rash, Deputy Circuit Court Clerk of the Mason Circuit Court do hereby certify that I am the Official Custodian of the Record No. 1235 & 1236 in the Mason Circuit Court and that the foregoing is a full, true, and exact copy of the Indictment No. 1235 & 1236, Commonwealth of Kentucky vs. Chester Kimble Trial & Verdict and Judgment & Commitment as same appears in the records of the Office of the Mason Circuit Court.

Witness my hand and seal this the 10 March, 1962.

C. L. Clift, Clerk,
Mason Circuit Court,
By: (s) Inez E. Rash, D. C.

[fol. 71]

In United States District Court

Eastern District of Kentucky

At Covington

No. 1005

United States of America, Plaintiff,

v.

Bayard Edward Ryan, Blue Run Road, Maysville, Kentucky, Defendant.

Order to Produce Records, Etc.—March 15, 1962

Pursuant to order of January 10, 1962, this case was called on March 12, 1962, with the Government being represented by George Cline, Assistant U. S. Attorney, and the defendant by William R. Bagby.

Opening statements were made for the Government by Mr. Cline, and for the defendant by Mr. Bagby.

The Court heard evidence introduced by the parties and counsel for the defendant and being advised.

Ordered that the defendant Bayard Edward Ryan shall comply with the summons mentioned in the verified com-

plaint directing him to appear and produce for examination the books, papers, record and memoranda, as set out therein more particularly.

Mac Swinford, Judge.

March 15, 1962.

[fol. 72]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed March 23, 1962

Notice is hereby given that the defendant, Bayard Edward Ryan, appeals to the United States Court of Appeals for the Sixth Circuit from the final Order entered in this case on 15th day of March, 1962.

William R. Bagby, Attorney for Appellant, 615 First National Bank Building, Lexington, Ky.

1 attested copy: U. S. Attorney

1 attested copy: William R. Bagby

[fol. 73]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—April 9, 1963

(Omitted in printing.)

[fol. 74] [File endorsement omitted]

No. 14945

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

BAYARD EDWARD RYAN, Defendant-Appellant.

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

OPINION—Decided August 1, 1963

Before: CECIL, Chief Judge, WEICK, Circuit Judge and MCALLISTER, Senior Circuit Judge.

WEICK, Circuit Judge. This appeal is from an order of the District Court enforcing summons issued by an agent of the Internal Revenue Service which required appellant taxpayer to appear, testify and produce his books and records for the years 1942 to 1953 inclusive.

Taxpayer had refused to produce his books and records in response to the summons. His claim was that collection of the tax for the years in question was barred by the statute of limitations except for fraud and therefore the agent had no right to make the examination. His attorney, however, offered to comply with the summons if the agent satisfied him that there were reasonable grounds for suspicion of fraud.

In the complaint filed in the District Court, it was alleged that "pursuant to a net worth estimate of the defendant's assets which has been conducted by Donald Whelan [the

Internal Revenue agent] concerning the period from 1942 through 1953 reasonable grounds exist for a strong suspicion that the defendant . . . has made a fraudulent understatement of income in the income tax returns submitted [fol. 75] by him . . . during those years." It was also alleged that the records described in the summons "are relevant and material to the question of tax liability [taxpayer's] . . . and that the summons . . . is not unreasonable under the circumstances."

At the hearing in the District Court, Internal Revenue Agent Whelan testified that as a result of his examination of taxpayer's records for 1954-1958 he determined a deficiency; that it is necessary to examine taxpayer's books and records for the years 1942-1953 for two reasons. First, in order to determine taxpayer's correct tax liability for those years and second, to procure information for net worth computations for the years 1954-1958.[1]

It is taxpayer's position that in order to entitle the government to enforcement of summons with respect to the barred years, it "must establish to the satisfaction of the District Court that a reasonable basis exists for his suspicion of fraud or that probable cause exists to believe the taxpayer was guilty of fraud." He asserts that the testimony of the agent falls short of proving this requirement.

The pertinent provisions of the statutes appear in Chapter 78 of the Internal Revenue Code of 1954 under the heading "Discovery of Liability and Enforcement of Title." The title to Subchapter A is "Examination and Inspection."

26 U. S. C. section 7602 provides in part as follows:

> For the purpose of ascertaining the correctness of any return, . . . determining the liability of any person for any internal revenue tax, . . . the Secretary or his delegate is authorized—

---

[1] We are advised that since the hearing in the District Court taxpayer settled with the government for the years 1954-1958. This settlement would not affect the right which the government may have to obtain the records to determine taxpayer's correct tax liability for 1942-1953.

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the [fol. 76] Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Section 7603 provides for the service of summons.

Section 7604 confers jurisdiction on the District Court to enforce compliance with the summons.

These sections of the Code confer broad investigative powers on the Secretary to aid him in the performance of his statutory duties and provide a summary procedure in court to enforce compliance with the summons. Nowhere has Congress required the Secretary to establish, as a condition precedent to the exercise of his right to investigate, that he have a reasonable basis therefor or probable cause to suspect criminality. We do not think this investigative proceeding is at all analogous to a preliminary hearing in a criminal case where probable cause must be shown in order to hold the defendant for the grand jury. No charge has yet been made. The Secretary is desirous only of making an investigation. If he had the facts to establish probable cause he might not need to make any investigation.

The only restriction provided by Congress is against making "unnecessary examination or investigations." 26 U.S.C. § 7605 (b).

We think the District Court was justified in concluding from the testimony of the Internal Revenue Agent that he ought not to disturb the determination made by the Secretary that the investigation was necessary.

To construe the statute as contended by the taxpayer would seriously curtail the powers of investigation granted to the Secretary by Congress. It would impose a condition precedent on the exercise of that power not authorized by Congress. It would permit the court and not the Secretary to determine whether an investigation was necessary. It would hamper the Secretary in the performance of his statutory duties. It would convert a summary enforcement proceeding into a full scale trial to determine whether the Secretary had reasonable grounds or probable cause for the [fol. 77] investigation. This is not to say that the court is without power to determine whether the investigation is being made in good faith for one of the purposes authorized by the statute or to relieve against oppressive procedures. *Goldberg* v. *Truck Drivers Local Union No. 299*, 293 F.2d 807, 814 (CA 6), cert. denied 368 U.S. 938.

In *Peoples Deposit Bank & Trust Co.* v. *United States*, 212 F.2d 86 (CA 6), cert. denied 348 U.S. 838 we accepted the testimony of a special agent who had a strong suspicion that a false and fraudulent return was made by the taxpayer. We held that the agent was not required to disclose in detail the facts relative to his investigation nor was the District Court obliged to require proof of facts showing reasonable grounds that the returns were false and fraudulent.

In *Eberhart* v. *Broadrock Development Corp.*, 296 F.2d 685 (CA 6), cert. denied 369 U.S. 871 we held that the evidence offered by the government was sufficient to justify the order compelling compliance.

In *Goldberg* v. *Truck Drivers Local Union No. 299*, supra, we refused to impose a probable cause condition on the right of the Secretary of Labor to make an investigation under the powers conferred upon him by the Landrum-Griffin Act.

Other cases not requiring the establishment of probable cause as a condition precedent to a tax investigation are *Falsone* v. *United States*, 205 F.2d 734 (CA 5); *Foster* v. *United States*, 265 F.2d 483 (CA 2); *McDermott* v. *John Baumgarth Co.*, 286 F.2d 864, 867 (CA 7); *DeMasters* v. *Arend*, 313 F.2d 79 (CA 9).

We do not follow the decisions in *O'Connor* v. *O'Connell*, 253 F.2d 365 (CA 1) and *Lash* v. *Nighosian*, 273 F.2d 185 (CA 1) relied on by taxpayer which represent a minority view.

Another reason advanced by taxpayer for refusing the examination is that the original returns for the years in question are no longer in existence and without the returns the government could not impeach them for fraud citing *Drieborg* v. *Commissioner*, 225 F.2d 216 (CA 6). The rule in *Drieborg* does not apply to an investigative proceeding. We cannot anticipate here the government's proof in another case as to the contents of the income tax returns assuming that the originals are unavailable.

[fol. 78] The taxpayer further argues that since a deficiency had been assessed as to tax year 1945 in 1948, the Commissioner was required to send a statutory letter requesting a reexamination for that year. 26 U.S.C. § 7605. The government relies on *Norda Essential Oil & Chemical Co.* v. *United States*, 230 F.2d 764 (CA 2), cert. denied 351 U.S. 964 where it sought records for two tax years which had already been examined but were required for reexamination in determining a tax liability for a third year. The court held that under section 7605 each taxable year was a unit by itself which could be separately examined and that since this was the first inspection for the third year, the records of the other two years, relevant to the third year, could be examined. If the Commissioner was redetermining the tax liability for those two years, a statutory notice would be required. Here, it would appear that the Commissioner could examine any records for the years 1942-1953 in determining tax liability and possibility of fraud for any of those years, with the exception of the year 1945. If a reexamination as to 1945 is sought, a statutory notice appears to be required.

The claim is further made that taxpayer does not have all of the books, records and papers called for in the summons and therefore cannot produce something which he does not have. In the District Court he claimed that he was not required to supply any of the records. Whether he is able to produce any particular record will have to be determined in the District Court.

The judgment of the District Court is affirmed.

[fol. 79]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDGMENT—Filed August 1, 1963

Appeal from the United States District Court for the Eastern District of Kentucky.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

Paul C. Weick, United States Circuit Judge.

[fol. 80] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 81]

SUPREME COURT OF THE UNITED STATES

No. 590—October Term, 1963

BAYARD EDWARD RYAN, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—February 17, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
OCT 29 1963

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. [redacted]712

BAYARD EDWARD RYAN, - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

WILLIAM R. BAGBY,
1107 First National Bank Bldg.,
Lexington, Kentucky,
Counsel for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1963

No. _____

BAYARD EDWARD RYAN, - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A, *infra,* pp. 9-14) is reported at 320 F. 2d 500 (1963). The opinion of the Federal District Court is not officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 1, 1963 (Appendix A, *infra,* p. 15). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED.

In making an examination of the taxpayer's filed income tax returns for twelve years, for which years the assessment and collection of additional taxes were long since barred by all statutes of limitation except by proof of fraud, an agent of the Internal Revenue Service issued a summons for the taxpayer to produce his books for these twelve years. Where the taxpayer did not produce the books, the question is whether the agent is entitled to enforcement by the District Court of the summons when he merely says or testifies that the books are necessary for this examination. Or, whether he must establish to the satisfaction of the District Court that a reasonable basis exists for a suspicion of fraud or that probable cause exists to believe that the taxpayer was guilty of fraud.

STATUTES INVOLVED.

The pertinent provisions of Sections 7602, 7604, and 7605 of the Internal Revenue Code of 1954 are set forth in Appendix B, *infra,* pp. 16-17.

STATEMENT.

The taxpayer, Bayard Edward Ryan, filed a timely Federal income tax return for each of the years 1942 to 1953, inclusive (Pl. Ex. 1; R. 2a, 38a, 50a to 54a, inclusive).

On August 21, 1961, an agent of the Internal Revenue Service issued a summons requiring the taxpayer

to appear, testify, and produce his books for the years 1942 to 1953, inclusive (R. 2a).

At the time the summons was issued the assessment and collection of additional income taxes for each of the years 1942 to 1953, inclusive, were barred by all statutes of limitations except by proof of fraud (R. 50a to 54a, inclusive).

The taxpayer appeared at the time and place designated in the summons but did not produce his books for the statute-barred years (R. 25a, 39a; Appendix A, p. 9). The agent filed a complaint with the District Court to require the taxpayer to produce the books (R. 2a). The sole basis of the agent's claim of right to have the books for the statute-barred years was his own statement that the books were necessary to determine the income tax liability for those years (Appendix A, p. 11). The taxpayer answered that the agent should establish to the satisfaction of the court that a reasonable basis exists for a suspicion of fraud or that probable cause exists to believe that he had been guilty of fraud (R. 16a).

The District Court agreed with the agent of the Internal Revenue Service and held that the agent, to justify enforcement of the summons to produce the books for statute-barred years, need only say that the books were necessary to his examination (R. 33a, 49a; Appendix A, p. 11). The District Court ruled that the agent need not establish to the satisfaction of the court that a reasonable basis exists for a suspicion of fraud or that probable cause exists to believe the taxpayer was guilty of fraud (R. 37a). The District Court said

that the agent need only say or testify that he believed there was some connection between his examination and the records of the taxpayer (R. 27a, 30a, 31a). The District Court said that any taxpayer, at any time and for any year, whether statute barred or not, can be forced to make a full disclosure of his books and records; that an agent can stop the first man he sees on the street, and make him, then and there, surrender his books and records for any year (R. 32a, 33a).

The Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court and said that the only restriction provided by Congress as to the power of the summons issued by the revenue agent is against making "unnecessary examination or investigation" (Appendix A, pp. 12-14).

REASON FOR GRANTING THE WRIT.

(1) The decision below is in direct conflict with the decisions of the Court of Appeals for the First Circuit in *O'Connor* v. *O'Connell,* 235 F. 2d 185, and *Lash* v. *Nighosian,* 273 F. 2d 185.

In the *O'Connor* case, the court held that mere suspicion of fraud by an agent of the Internal Revenue Service is not sufficient for an examination of statute-barred years and the Government must show that a reasonable basis exists for the suspicion of fraud or that there is probable cause to believe that the taxpayer was guilty of fraud. The court in the *O'Connor* case presented the entire picture of the problem as follows (pp. 369 and 370):

"To make the Congressional purpose expressed in §7605(b) to protect taxpayers from unnecessary examinations truly effective we think the Secretary or his delegate, when a court order is needed to enforce compliance with a summons to testify as to a 'closed' year, should be required to establish to the court's satisfaction that there is probable cause for an investigation into such a year. We think Congress intended to give taxpayers this much protection when the investigation of their returns may reach far back into the past, in this case fourteen years, and in some cases perhaps even further, and that to require such a showing does not impose too heavy a burden upon the tax authorities or unduly restrict or hamper them in tax enforcement.

"Furthermore, this interpretation of §7605(b) is in accord with the limitations upon the inquisitorial powers of government which have become traditional in this country. We agree with Judge Moscowitz' statement in *In Re Brooklyn Pawnbrokers, Inc.*, 39 Fed. Supp. 304, 305 (D.C. E.D. N. Y. 1941) that 'to permit the government to examine as to statute-barred years upon a mere conclusory allegation of fraud is to deprive the taxpayer of that freedom from unreasonable harrassment which he has a right to expect under a democratic form of government.

"This does not mean that proof of fraud is required. It means only that before the tax authorities are entitled to a district court order enforcing a summons directing a taxpayer to testify as to a closed year they must establish to the district court's satisfaction that a reasonable basis exists

> for a suspicion of fraud, or put another way, that there is probable cause to believe that the taxpayer was guilty of fraud in a statute-barred year. We, therefore . . . agree with the rule as it was assumed to be in *Martin* v. *Chandis Securities Co.*, 128 Fed. 2d 731, 735 (C.A. 9, 1942) . . ."

The court of the first circuit in *Lash* v. *Nighosian* (C.A. 1, 1960), 273 F. 2d 185, 188, reiterated and reaffirmed its holding in *O'Connor,* by rejecting the contention that all the Secretary or his delegate needed to show to obtain an order enforcing a summons with respect to a closed year was the honesty of his subjective belief that the taxpayer had been guilty of fraud in such a year. The court, at page 189, pointed out further that:

> "The function of the district courts in these cases as we see it is comparable to the function of a grand jury. It is to prevent the secretary or his delegate from going on a 'fishing expedition' into a taxpayer's books or records for closed years, or from acting upon a mere hunch or a vague surmise, but to permit inspection as to closed years when the court is satisfied, meaning persuaded or content, that the official who issued the summons had a reasonable basis for his belief that the taxpayer had been guilty of fraud in a closed year. . . ."

The circuit court below for the sixth circuit said:

> "We do not follow the decisions in *O'Connor* v. *O'Connell,* 253 F. 2d 365 (C. A. 1), and *Lash* v.

Nighosian, 273 F. 2d 185 (C.A. 1), relied on by taxpayer which represents a minority view."

As to the question presented by this petition, the conflict between the Sixth and First Circuits, is therefore complete.

CONCLUSION.

For the reason stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM R. BAGBY,
1107 First National Bank Bldg.,
Lexington, Kentucky,
Counsel for Petitioner.

October, 1963.

APPENDIX A.

1. OPINION OF THE COURT OF APPEALS.

Filed August 1, 1963.

No. 14945

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. BAYARD EDWARD RYAN, *Defendant-Appellant.*	ON APPEAL from the order of the United States District Court for the Eastern District of Kentucky.

Decided August 1, 1963.

Before: CECIL, Chief Judge, WEICK, Circuit Judge and MCALLISTER, Senior Circuit Judge.

WEICK, Circuit Judge. This appeal is from an order of the District Court enforcing summons issued by an agent of the Internal Revenue Service which required appellant taxpayer to appear, testify and produce his books and records for the years 1942 to 1953 inclusive.

Taxpayer had refused to produce his books and records in response to the summons. His claim was that collection of the tax for the years in question was barred by the statute of limitations except for fraud and therefore the agent

had no right to make the examination. His attorney, however, offered to comply with the summons if the agent satisfied him that there were reasonable grounds for suspicion of fraud.

In the complaint filed in the District Court, it was alleged that "pursuant to a net worth estimate of the defendant's assets which has been conducted by Donald Whelan [the Internal Revenue agent] concerning the period from 1942 through 1953 reasonable grounds exist for a strong suspicion that the defendant . . . has made a fraudulent understatement of income in the income tax returns submitted by him . . . during those years." It was also alleged that the records described in the summons "are relevant and material to the question of tax liability [taxpayer's] . . . and that the summons . . . is not unreasonable under the circumstances."

At the hearing in the District Court, Internal Revenue Agent Whelan testified that as a result of his examination of taxpayer's records for 1954-1958 he determined a deficiency; that it is necessary to examine taxpayer's books and records for the years 1942-1953 for two reasons. First, in order to determine taxpayer's correct tax liability for those years and second, to procure information for net worth computations for the years 1954-1958.[1]

It is taxpayer's position that in order to entitle the government to enforcement of summons with respect to the barred years, it "must establish to the satisfaction of the District Court that a reasonable basis exists for his suspicion of fraud or that probable cause exists to believe the taxpayer was guilty of fraud." He asserts that the testimony of the agent falls short of proving this requirement.

[1]We are advised that since the hearing in the District Court taxpayer settled with the government for the years 1954-1958. This settlement would not affect the right which the government may have to obtain the records to determine taxpayer's correct tax liability for 1942-1953.

The pertinent provisions of the statutes appear in Chapter 78 of the Internal Revenue Code of 1954 under the heading "Discovery of Liability and Enforcement of Title." The title to Subchapter A is "Examination and Inspection."

26 U.S.C. section 7602 provides in part as follows:

> For the purpose of ascertaining the correctness of any return, . . . determining the liability of any person for any internal revenue tax, . . . the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Section 7603 provides for the service of summons.

Section 7604 confers jurisdiction on the District Court to enforce compliance with the summons.

These sections of the Code confer broad investigative powers on the Secretary to aid him in the performance of his statutory duties and provide a summary procedure in

court to enforce compliance with the summons. Nowhere has Congress required the Secretary to establish, as a condition precedent to the exercise of his right to investigate, that he have a reasonable basis therefor or probable cause to suspect criminality. We do not think this investigative proceeding is at all analogous to a preliminary hearing in a criminal case where probable cause must be shown in order to hold the defendant for the grand jury. No charge has yet been made. The Secretary is desirous only of making an investigation. If he had the facts to establish probable cause he might not need to make any investigation.

The only restriction provided by Congress is against making "unnecessary examination or investigations." 26 U.S.C. § 7605 (b).

We think the District Court was justified in concluding from the testimony of the Internal Revenue Agent that he ought not to disturb the determination made by the Secretary that the investigation was necessary.

To construe the statute as contended by the taxpayer would seriously curtail the powers of investigation granted to the Secretary by Congress. It would impose a condition precedent on the exercise of that power not authorized by Congress. It would permit the court and not the Secretary to determine whether an investigation was necessary. It would hamper the Secretary in the performance of his statutory duties. It would convert a summary enforcement proceeding into a full scale trial to determine whether the Secretary had reasonable grounds or probable cause for the investigation. This is not to say that the court is without power to determine whether the investigation is being made in good faith for one of the purposes authorized by the statute or to relieve against oppressive procedures. *Goldberg* v. *Truck Drivers Local Union No. 299*, 293 F. 2d 807, 814 (CA 6), cert. denied 368 U. S. 938.

In *Peoples Deposit Bank & Trust Co.* v. *United States*, 212 F. 2d 86 (CA 6), cert. denied 348 U. S. 838, we accepted

the testimony of a special agent who had a strong suspicion that a false and fraudulent return was made by the taxpayer. We held that the agent was not required to disclose in detail the facts relative to his investigation nor was the District Court obliged to require proof of facts showing reasonable grounds that the returns were false and fraudulent.

In *Eberhart* v. *Broadrock Development Corp.*, 296 F. 2d 685 (CA 6), cert. denied 369 U. S. 871, we held that the evidence offered by the government was sufficient to justify the order compelling compliance.

In *Goldberg* v. *Truck Drivers Local Union No. 299*, supra, we refused to impose a probable cause condition on the right of the Secretary of Labor to make an investigation under the powers conferred upon him by the Landrum-Griffin Act.

Other cases not requiring the establishment of probable cause as a condition precedent to a tax investigation are *Falsone* v. *United States*, 205 F. 2d 734 (CA 5); *Foster* v. *United States*, 265 F. 2d 183 (CA 2); *McDermott* v. *John Baumgarth Co.*, 286 F. 2d 864, 867 (CA 7); *DeMasters* v. *Arend*, 313 F. 2d 79 (CA 9).

We do not follow the decisions in *O'Connor* v. *O'Connell*, 253 F. 2d 365 (CA 1), and *Lash* v. *Nighosian*, 273 F. 2d 185 (CA 1), relied on by taxpayer which represent a minority view.

Another reason advanced by taxpayer for refusing the examination is that the original returns for the years in question are no longer in existence and without the returns the government could not impeach them for fraud citing *Drieborg* v. *Commissioner*, 225 F. 2d 216 (CA 6). The rule in *Drieborg* does not apply to an investigative proceeding. We cannot anticipate here the government's proof in another case as to the contents of the income tax returns assuming that the originals are unavailable.

The taxpayer further argues that since a deficiency had been assessed as to tax year 1945 in 1948, the Commissioner was required to send a statutory letter requesting a reexamination for that year. 26 U.S.C. § 7605. The government relies on *Norda Essential Oil & Chemical Co.* v. *United States*, 230 F. 2d 764 (CA 2), cert. denied 351 U. S. 964, where it sought records for two tax years which had already been examined but were required for reexamination in determining a tax liability for a third year. The court held that under section 7605 each taxable year was a unit by itself which could be separately examined and that since this was the first inspection for the third year, the records of the other two years, relevant to the third year, could be examined. If the Commissioner was redetermining the tax liability for those two years, a statutory notice would be required. Here, it would appear that the Commissioner could examine any records for the years 1942-1953 in determining tax liability and possibility of fraud for any of those years, with the exception of the year 1945. If a reexamination as to 1945 is sought, a statutory notice appears to be required.

The claim is further made that taxpayer does not have all of the books, records and papers called for in the summons and therefore cannot produce something which he does not have. In the District Court he claimed that he was not required to supply any of the records. Whether he is able to produce any particular record will have to be determined in the District Court.

The judgment of the District Court is affirmed.

2. JUDGMENT OF THE COURT OF APPEALS 34.25

(Caption Omitted) 21.25
Filed August 1, 1963 23.50

Before: CECIL, Chief Judge, WEICK, Circuit Judge and MCALLISTER, Senior Circuit Judge.

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

(s) Paul C. Weick,
U. S. Circuit Judge.

APPENDIX B.

STATUTES INVOLVED.

Internal Revenue Code of 1954
(26 U. S. C. 1958 ed.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, . . . to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be revelant or material to such inquiries.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which said person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

SEC. 7605. TIME AND PLACE OF EXAMINATION.

* * * * * * * *

(b) *Restrictions on Examination of Taxpayer.*—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 590

BAYARD EDWARD RYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 9–14) is reported at 320 F 2d 500.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1963 (Pet. 15). The petition for a writ of certiorari was filed on October 29, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Internal Revenue Service must establish probable cause to believe that a taxpayer has been guilty of fraud in order to obtain a court order en-

forcing a good-faith summons directed to the production of books and records pertaining to "closed" tax years.

STATUTES INVOLVED

The statutes involved are printed in the Appendix, *infra*, pp. 9–12.

STATEMENT

On August 21, 1961, Donald Whelan, an Internal Revenue Agent, issued a summons directing petitioner to appear at the Internal Revenue Service office in Maysville, Kentucky, to testify and to produce all books and records pertinent to his taxable income for the years 1942 through 1953 (R. 2a–3a.)[1] Petitioner had filed tax returns for each of those years, and collection of any tax deficiency was barred by the ordinary 3-year statute of limitations, unless the returns were fraudulent. Petitioner appeared in response to the summons, but he refused to submit his books and records for examination unless the agent would first submit to him or to his counsel facts demonstrating reasonable grounds for belief that the tax returns were fraudulent (R. 4a, 12a).

The Internal Revenue Service subsequently instituted the present proceeding by filing a complaint in the District Court for the Eastern District of Kentucky, seeking the court's aid in enforcing compliance with the summons (R. 2a–5a). The complaint stated that the agent had "reasonable grounds * * * for a strong suspicion" that petitioner had fraudulently understated his income for the years 1942–1953, and that

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[1] "R." refers to the appendix to petitioner's brief in the court below.

the requested examination was also needed in order to complete an existing investigation of petitioner's tax liabilities.[2] The complaint asserted that the suspicion of fraud was based on "a net worth estimate of the defendant's assets which has been conducted by Donald Whelan" (R. 3a, 4a).

At a hearing in the district court, the agent testified that he had examined petitioner's records for the years 1954 through 1958; that he had determined tax deficiencies for those years; and that he desired to examine petitioner's books for the 1942–1953 period, both in order to determine petitioner's correct tax liability for those earlier years, and in order to corroborate, by a net worth computation, his determination of deficiencies for the 1954–1958 period (R. 24a, 26a). He testified that the determination as to the possibility of fraud was made by him and by his superiors in the Internal Revenue Service, and was based partly upon his tentative net worth computation, and also upon government documents and third party information (R. 29a, 36a). Petitioner's counsel then inquired whether the agent had with him the "tentative net worth" which he had used. The court sustained the government's objection to this question on the ground that the agents "don't have to prove fraud before they go into it" (R. 33a). The court ordered petitioner to

[2] The existing investigation pertained to the "open" years 1954–1958, for which net worth computations were being made. After the district court's order in this case a settlement was reached with reference to the years 1954–1958 (Pet. 10, note 1). Consequently, the only reason remaining for enforcement of the summons is the possibility of fraud in the earlier "closed" years.

comply with the summons (R. 71a), and the court of appeals affirmed (Pet. 15).

ARGUMENT

Petitioner asserts a single reason why this case is appropriate for review by this Court—*i.e.*, that the decision below conflicts with the rule announced in two cases by the Court of Appeals for the First Circuit. Although this conflict exists—and was expressly recognized by the court of appeals in the present case (Pet. 13)—the overwhelming weight of authority (represented by decisions of the four other circuits which have had occasion to consider the question) supports the result reached below. Moreover, the result is clearly correct and follows from principles regarding administrative summonses which have been established by this Court in analogous circumstances.

1. The rule announced by the First Circuit in *O'Connor* v. *O'Connell*, 253 F. 2d 365, and in *Lash* v. *Nighosian*, 273 F. 2d 185, certiorari denied, 362 U.S. 904, is (253 F. 2d at 370):

> [B]efore the tax authorities are entitled to a district court order enforcing a summons directing a taxpayer to testify as to a closed year they must establish to the district court's satisfaction that a reasonable basis exists for a suspicion of fraud, or put another way, that there is probable cause to believe that the taxpayer was guilty of fraud in a statute barred year.

This doctrine has been rejected by all other courts of appeals which have had occasion to consider the question. See *United States* v. *United Distillers*

Products Corp., 156 F. 2d 872 (C.A. 2); *Foster* v. *United States*, 265 F. 2d 183 (C.A. 2), certiorari denied, 360 U.S. 912; *Globe Construction Co.* v. *Humphrey*, 229 F. 2d 148 (C.A. 5); *McDermott* v. *John Baumgarth Co.*, 286 F. 2d 864, 867 (C.A. 7); *DeMasters* v. *Arend*, 313 F. 2d 79 (C.A. 9), petition for certiorari dismissed by stipulation, No. 159, this Term.

2. The overwhelming majority view, which was followed in this case, is that a district court's power is limited to determining "whether the investigation is being made in good faith for one of the purposes authorized by the statute or to reliev[ing] against oppressive procedures" (Pet. 12). This limited judicial power is similar to that which, according to decisions of this Court, courts are to exercise over other kinds of administrative summonses. See, *e.g.*, *United States* v. *Morton Salt Co.*, 338 U.S. 632; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501. As this Court noted in *Morton Salt* (338 U.S. at 642–643), the investigatory powers delegated to the agency were "more analogous to [those of] the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." The limits of such investigatory power are that the administrator "shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be 'limited * * * by forecasts of the probable result of the investigation * * *.'" *Okla-*

homa Press Publishing Co. v. *Walling*, 327 U.S. 186, 216.

The Internal Revenue Code grants investigatory powers no less broad than those found in the statutes construed by this Court in the cases just cited. Compare Sections 7601 and 7602 of the Internal Revenue Code of 1954 (see Appendix, *infra*) with the statutory provisions set out in *Oklahoma Press*, 327 U.S. at 199–200, nn. 23 and 24. Consequently, there is no reason why the Internal Revenue Service should be held to a stricter standard than administrative agencies or other officials to whom similar power has been delegated.

3. Section 7605(b) of the Code, which prohibits "unnecessary" examinations of a taxpayer's records, does not sustain the position urged by petitioner. As the Court of Appeals for the Ninth Circuit concluded in *DeMasters* v. *Arend*, 313 F. 2d 79, 87, petition for certiorari dismissed by stipulation, No. 159, this Term, after an analysis of the legislative history of that provision and the case law interpreting it: "* * * Congress was primarily concerned with protecting taxpayers from examinations which were 'unnecessary' in the sense that they followed prior investigations of the same matter which had established that there was no basis for liability." See also *Application of the United States*, 246 F. 2d 762, 765 (C.A. 2); Cooper, *Federal Agency Investigations: Requirements for the Production of Documents*, 60 Mich. L. Rev. 187, 204–205 (1961). A judicial determination of the Service's good faith—which may be based on the testimony and demeanor of the

agent—is certainly adequate to protect taxpayers against this apprehended evil, particularly when, as here, there is no claim that the investigation duplicates an earlier inquiry.

CONCLUSION

Despite the conflict, there is no occasion for further review. The decision below is clearly correct, and is in accord with the decisions of four of the five other circuits which have passed upon the question; and there is no need for uniformity among the circuits on the relatively unimportant question involved. The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

DECEMBER 1963.

APPENDIX

Internal Revenue Code of 1954:

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

* * * * *

(e) *Exceptions.*—

(1) *False return.*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) *Willful attempt to evade tax.*—In case of a willful attempt in any number to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(26 U.S.C. 1958 ed., Sec. 6501.)

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) *General Rule.*—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7601.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 1958 ed., Sec. 7602.)

SEC. 7604. [As amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 87 and Sec. 208(d)(4), Highway Revenue Act of 1956, c. 462, 70 Stat. 374]. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books,

papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7604.)

SEC. 7605. [As amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 87 and Sec. 208(d)(4), Highway Revenue Act of 1956, c. 462, 70 Stat. 374]. TIME AND PLACE OF EXAMINATION.

(a) *Time And Place.*—The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421(f)(2), or 7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable

under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2) or 6421(f)(2), the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

(b) ***Restrictions On Examination Of Taxpayer.***—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(26 U.S.C. 1958 ed., Sec. 7605.)

U.S. GOVERNMENT PRINTING OFFICE 1963

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. [redacted] 12

BAYARD EDWARD RYAN, . . . Petitioner,

versus

UNITED STATES OF AMERICA, . . Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

WILLIAM R. BAGBY,
1107 First National Bank Bldg.,
Lexington, Kentucky,
Counsel for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 590

BAYARD EDWARD RYAN, - - - *Petitioner;*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

REASON FOR GRANTING THE WRIT.

The respondent, in its Brief, correctly acknowledged that there is a conflict between the First Circuit and the Sixth Circuit on the issue here involved.

The Tax Division of the Department of Justice in Washington, D. C., by long distance telephone has just apprised counsel for petitioner of the recent case in the Third Circuit of *U. S.* v. *Max Powell and William Penn Laundry, Inc.*, which case was not filed until De-

cember 23, 1963. The *Powell* case is clearly in conflict with the instant Sixth Circuit case.[1]

---

[1]The Third Circuit appears to believe the *Ryan* case to be distinguishable from the *Powell* case as that court stated as follows:

> ". . . However, the opinion (referring to opinion of Sixth Circuit) shows that the petitioning revenue agent testified in the enforcement proceeding and explained the basis of his apprehension concerning fraud. Moreover, the decisive conclusion of the Court of Appeals was that 'the District Court was justified in concluding from the testimony of the Internal Revenue Agent that he ought not to disturb the determination made by the Secretary that the investigation was necessary.'"

In the trial before the District Court in the *Ryan* case, the revenue agent did *not* pretend to offer and did not offer any testimony as to his belief of fraud or as to any facts of the basis of any such belief. The Sixth Circuit, relative to the testimony of the revenue agent, merely said—and correctly so, that—

> "At the hearing in the District Court, Internal Revenue Agent Whelan testified that as a result of his examination of taxpayer's records for 1954-1958 he determined a deficiency; that it is necessary to examine taxpayer's books and records for the years 1942-1953 for two reasons. First, *in order to determine the taxpayer's correct tax liability for those years* and second, to procure information for net worth computations for the years 1954-1958. (We are advised that since the hearing in the District Court taxpayers settled with the government for the years 1954-1958. This settlement would not affect the right which the government may have to obtain the records to determine taxpayer's correct tax liability for 1942-1953.)" (Italics supplied.)

At page 9 of the Petitioner's Brief filed with the Sixth Circuit there appears the following:

> "In the instant case, counsel for taxpayer argued that the agent should be required to reveal to the Court facts indicating a reasonable basis for suspicion of fraud of the agent for the years 1942 to 1953, inclusive, inasmuch as these years were barred by the statute of limitations except for fraud (R. 2, 3, 17, 18, 19, 22).
>
> "The Trial Court ruled against the taxpayer and held that, under the statute (Sec. 7602, Internal Revenue Code), fraud was not involved in and had no bearing on the issue because fraud was not an element of the law (R. 27, 28, 21, 22); and that the statute said nothing about the agent's having to believe that there was fraud or his having to be

(Footnote continued on following page)

suspicious of fraud. The words of the Trial Court were as follows (R. 27, 28):

> 'The Court: I don't think, Mr. Bagby, that the question of fraud enters into it. This statute says nothing about the agent having to believe or be suspicious of fraud. That is not an element of the law at all. . . .'

The Trial Court held that the agent had a right to the books irrespective of what he (the agent) thought of fraud and that what the agent thought made no difference (R. 28). The Trial Court said whether the agent thought fraud or no fraud or whether the agent's thinking was erroneous or whether he had nothing to base an opinion on was not the question, as follows (R. 28):

> 'In other words, it gives them the right to examine all of the available data irrespective of what they might think about fraud. What difference does it make what this agent thought? That is not the determining factor in this case. Whether he thought fraud or not fraud or whether his thinking was erroneous or whether he had nothing to base an opinion on is not the question. This is an examination to determine whether or not there was fraud' (R. 28).

"The Trial Court further said that the agent was not starting his examination with the idea that there was fraud; that the reason the agent wanted the records was to determine whether or not there was fraud (R. 19).

"The Trial Court further held that, any taxpayer, at any time and for any year (whether barred or not by the statute of limitations) can be forced to make a full disclosure of his books and records (R. 19, 21); that an agent can stop the first man he sees on the street, and make him, then and there, surrender his books and records for any year. The exact works of the Trial Court were as follows (R. 21, 22).

> 'Mr. Bagby: No, we are not trying that, Your Honor. What we mean is there must be some facts of some sort, some indications, that there was fraud.
>
> 'The Court: No, absolutely not. No, sir. They can go into anybody's tax business they want to, any taxpayer, fraud or no fraud. They don't have to prove fraud before they go into it. *They can ask anybody, go out there and stop the first man they meet on the street and say, "We want to see your books," and you have to let them have them.*
>
> 'Mr. Bagby: Then your position on that—my question is irrespective of fraud, they have a right to look at the records'?
>
> "The Court: Yes, sir. They do at all times. . . ."

(Italics supplied.)

The Third Circuit in the *Powell* case, upon considering Sections 7602, 7604(b) and 7605(b) of the 1954 Internal Revenue Code, held and stated as follows:

> "Rejecting this view, we consider it significant that section 7604(b) requires a 'hearing' on the application to enforce the administrative summons at which 'satisfactory proof' shall be made. We think this provision means that the Court shall decide on the basis of the showing made in the normal course of an adversary proceeding *whether the agent's suspicion of fraud is reasonable. O'Connor* v. *O'Connell,* 1st Cir. 1958, 253 F. 2d 365, followed in *Lash* v. *Niqhosian,* 1st Cir. 1959, 273 F. 2d 185, *cert. denied,* 1960, 362 U. S. 904; *United States* v. *Carey,* D. Del. 1963, 218 F. Supp. 298. . . .
>
> "Our conclusion is in accord with the ruling of the Court of Appeals for the First Circuit in *O'Connor* v. *O'Connell, supra,* and contrary to the language of the Courts of Appeals, for the Second Circuit in Foster v. United States, supra. . . ." Italics supplied.)

The respondent in its Brief stated at page 7, as follows:

> ". . . The decision below is clearly correct, and is in accord with the decisions of four of the five other circuits which have passed upon the question. . . ."

Other than the above mathematics of the alleged more circuits for its view, which proposition has now changed, the sole and only basis of the objection by the respondent to the acceptance and consideration by this

Court of the question involved was, as follows: (page 7 of Respondent's Brief)

> ". . . ; and there is no need for uniformity among the circuits on the relatively unimportant question involved. . . ."

However, it must be that there is the greatest need for uniformity among the circuits because the question here is indeed vital to every one of the some 80 million taxpayers in the country. It touches the life of every person who files a return, no matter where he lives or how much or how little income he may report. It affects the rights, liberty and freedom of every citizen of the United States.

The Constitution requires that taxes be uniform in rates and applied the same to every taxpayer, irrespective of the State or area from which he or she hails. The same Constitution surely requires that the enforcement of the tax apply the same. This would appear to be a vital question.

CONCLUSION.

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM R. BAGBY,
1107 First National Bank Bldg.,
Lexington, Kentucky,
Counsel for Petitioner.

January, 1964.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 590

BAYARD EDWARD RYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The petition for a writ of certiorari in this case was based upon an asserted conflict between the decision of the court below and two decisions of the First Circuit, *O'Connor* v. *O'Connell*, 253 F. 2d 365, and *Lash* v. *Nighosian*, 273 F. 2d 185, certiorari denied, 362 U.S. 904. The government opposed the petition for the reasons (1) that the holding of the court of appeals was in accord with recent rulings of this Court on the enforcement of administrative summonses, and (2) that the four other circuits which had considered the question were all in accord with the rule of the Sixth Circuit in this case.

718-094—64

Subsequent to the filing of the brief in opposition in this Court, the government was apprised of the decision by the Court of Appeals for the Third Circuit in *United States et al.* v. *Max Powell and William Penn Laundry, Inc.*, No. 14,516, issued on December 23, 1963 (see Appendix). In that case, the Third Circuit expressly states its agreement with the First Circuit's holdings in *O'Connor* and *Lash, supra,* and expressly rejects the holding of the Second Circuit in *Foster* v. *United States,* 265 F. 2d 183, certiorari denied, 360 U.S. 912, which is one of the cases upon which the Sixth Circuit relied in the present decision.

Although the Third Circuit in *Powell* attempts to distinguish the present case (p. 8, *infra*), we believe the two decisions to be in conflict. The premise of the Third Circuit's decision in *Powell* is that probable cause for the existence of fraud must be established before an Internal Revenue summons may be enforced. The premise of the Sixth Circuit's decision in this case is that enforcement should be granted unless it appears that the issuance of the summons was arbitrary or in bad faith.

Consequently, while five circuits are aligned, in principle, with the result in the present case, two others might very well reach the opposite result on the same facts. It may be that the difference among some of these circuits is merely "a matter of quantum of proof," as the Third Circuit apparently believes (p. 9, *infra,* n. 3). Nonetheless, the clearly conflicting positions of the First Circuit, on one hand, and

of the Second Circuit, on the other, have been approved by at least one other circuit in each instance. Since the issue seems to be a recurring one, and there is a live conflict over the basic principles to be applied, we withdraw our opposition to the petition for a writ of certiorari.

ARCHIBALD COX,
Solicitor General.

JANUARY 1964.

APPENDIX

United States Court of Appeals For the Third Circuit

No. 14,516

UNITED STATES OF AMERICA AND ERNEST J. TIBERINO, JR., SPECIAL AGENT, INTERNAL REVENUE SERVICE

v.

MAX POWELL AND WILLIAM PENN LAUNDRY, INC., APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 17, 1963

Before: MCLAUGHLIN, HASTIE AND FORMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed December 23, 1963)

By HASTIE, *Circuit Judge.*

The United States and a special agent of the Internal Revenue Service brought this action in the district court, as authorized by section 7604(b) of the 1954 Internal Revenue Code, to compel a corporate

taxpayer, William Penn Laundry, Inc., and its president, Max Powell, to obey an administrative summons, issued in March 1963 by special agent Ernest Tiberino, one of the plaintiffs, directing them to appear before him and to produce for reexamination certain records of the corporation for the years 1958 and 1959.

In response to the summons, Powell appeared before Tiberino at a formal hearing and pointed out that the taxpayer's records for 1958 and 1959 had already been examined, that the normal three-year statute of limitations had run against 1958 and 1959 deficiency assessments, that only to redress fraud could those closed years be reopened and that he knew of no basis upon which fraud could be attributed to the taxpayer. He then asked agent Tiberino to indicate some justification for reexamining the records in question and refused to produce them otherwise. Tiberino declined to justify his demand and summarily terminated the hearing. He then instituted this enforcement proceeding.

With this petition Tiberino filed in the district court his affidavit asserting that "on the basis of information obtained" in a current investigation of taxpayer's 1958 and 1959 income tax returns, "he has reason to suspect that the William Penn Laundry, Inc., has filed false and fraudulent corporate income tax returns for its fiscal years ending July 31, 1958 and July 31, 1959, with the intent to evade its taxes and has attempted to evade and defeat the taxes due for these years by overstating the amount of purchases made which in turn were used as expenses so as to fradulently understate the amount of taxable income for the above fiscal years". Answering the petition, the defendants stated what had occurred at the hearing before agent Tiberino and again refused

to produce the 1958 and 1959 records unless justification for their reexamination should be shown. When the matter came on for hearing, the plaintiffs elected to make no factual showing beyond Tiberino's affidavit. Indeed Tiberino was not present, appearing only by counsel. After hearing argument, the court ordered the defendants to honor the summons and produce their records for Tiberino's examination. The defendants have appealed from that order.

We first summarize the relevant provisions of the 1954 Internal Revenue Code. Section 7602 confers upon the Secretary of the Treasury or his delegate very broad power to summon witnesses and to require the production of records "as may be relevant or material" to inquiry into tax liability. Section 7605(b) prohibits subjecting a taxpayer "to unnecessary examination or investigations". Section 7604(b) provides that the judge who is asked to enforce an administrative summons shall hear the application and, "if satisfactory proof is made", take coercive action against the person summoned.

On this appeal we must determine in the light of the above cited provisions of the statute what a court's responsibility is when it is asked to enforce an administrative demand to reexamine a taxpayer's records after a return has been filed for the year in question, the taxpayer's supporting records have been examined, the tax has been paid in accordance with the indicated liability, and the normal three-year statute of limitations [1] has run against any further deficiency assessment. In such circumstances, the imposition of any additional liability upon the taxpayer must be predicated upon fraud. 26 U.S.C. § 6501(c)(1).

[1] There is no suggestion here that the six-year statute of limitations, applicable to gross understatement of income, may be applicable. 26 U.S.C. § 6501(e)(1).

Logically, therefore, a reexamination of his records must be "unnecessary" within the meaning of section 7605(b) unless something has been discovered by the Secretary's delegate which might cause a reasonable man to suspect that there has been fraud in the return for the otherwise closed year. *Cf. Farmers' & Mechanics' Nat. Bk.* v. *United States,* 3d Cir. 1926, 11 F. 2d 348; *In re Andrews' Tax Liability,* D.Md. 1937, 18 F. Supp. 804. Nevertheless, the government insists that the basis of the Treasury agent's suspicion is not a matter of judicial cognizance. Rather, it is argued, the agent is entitled to judicial enforcement of his demand for the taxpayer's records if he merely submits to the court his affidavit asserting in generality that "he has reason to suspect" that there has been fraud in the taxpayer's computation of his tax for the year in question. In the government's view the agent need not even set out in his affidavit the facts which gave him "reason to suspect" fraud, much less establish by testimony in court that his suspicion is reasonably grounded. This also seems to be the view of the Court of Appeals for the Second Circuit. *Foster* v. *United States,* 2d Cir. 1959, 265 F. 2d 183, *cert. denied,* 360 U.S. 912.

Rejecting this view, we consider it significant that section 7604(b) requires a "hearing" on the application to enforce the administrative summons at which "satisfactory proof" shall be made. We think this provision means that the court shall decide on the basis of the showing made in the normal course[2] of an adversary proceeding whether the agent's suspicion of fraud is reasonable. *O'Connor* v. *O'Connell,*

[2] If facts are alleged in the petition or in a supporting affidavit as the basis of the agent's suspicion and are not denied in a responsive pleading there may be no need to take testimony. Otherwise, the agent must present evidence showing some rational basis for his suspicion.

1st Cir. 1958, 253 F.2d 365, followed in *Lash* v. *Niqhosian*, 1st Cir. 1959, 273 F.2d 185, *cert. denied*, 1960, 362 U.S. 904; *United States* v. *Carey*, D.Del. 1963, 218 F. Supp. 298. This the court cannot do unless the agent discloses whatever may have created his suspicion. Since the agent in this case failed to make such disclosure, despite the taxpayer's formal request for it, his application for judicial assistance should have been denied.

Our conclusion is in accord with the ruling of the Court of Appeals for the First Circuit in *O'Connor* v. *O'Connell, supra*, and contrary to the language of the Court of Appeals for the Second Circuit in *Foster* v. *United States, supra*. The government also contends that very recent decisions in the Sixth and Ninth Circuits grant the government relief in cases like this one. We do not read those decisions that way.

United States v. *Ryan*, 6th Cir. 1963, 320 F.2d 500, does contain language suggesting that a court, asked to enforce an internal revenue summons, need not inquire into the reasonableness of administrative suspicion of fraud. However, the opinion shows that the petitioning revenue agent testified in the enforcement proceeding and explained the basis of his apprehension concerning fraud. Moreover, the decisive conclusion of the court of appeals was that "the district court was justified in concluding from the testimony of the Internal Revenue Agent that he ought not to disturb the determination made by the Secretary that the investigation was necessary."

The Court of Appeals for the Ninth Circuit dealt with this problem in *De Masters* v. *Arend*, 1963, 313 F.2d 79. There again the petitioning agent testified as to the basis of his suspicion. He had found that deposits in the bank account maintained for the taxpayer's store were substantially greater than the total

gross receipts of the business as reported in the taxpayer's income tax return. Moreover, a preliminary computation had indicated an increase in the taxpayer's net worth which far exceeded his reported income. With this testimony before it, the court said that "if it appeared that the decision to investigate * * * [possible fraud] was in fact reached as a matter of rational judgment based on the circumstances of the particular case, then the investigation could not be an 'unnecessary' one prohibited by Section 7605(b), just as the act of issuing an administrative subpoena in such circumstances would not be 'arbitrary' and the subpoena unenforceable." 313 F.2d at 90. The court concluded that the "showing by the taxpayers in the present case that further assessment was time-barred in the absence of fraud may have been sufficient to require the appellants to go forward with a justification of their inquiry. But this they did, and the showing which they made was sufficient to establish (1) that further investigation was undertaken pursuant to the Commissioner's authority, and (2) that the decision to proceed was not arbitrary." 313 F.2d at 91. This is essentially the position that we take in this case.[8]

The judgment will be reversed.

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[8] Probably the Sixth and Ninth Circuits would sustain administrative judgement as to the need for reexamination of records of closed years upon a less impressive showing of suspicious circumstances than the First Circuit would require. However, this is a matter of quantum of proof which does not concern us here because . showing whatever has been made as to the basis of the special agent's suspicion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 12

BAYARD EDWARD RYAN, - - - - *Petitioner,*

v.

UNITED STATES, - - - - - - *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

I. CONGRESS INTENDS TO PROTECT, NOT DESTROY THE SUCCESSFUL SELF-ASSESSMENT SYSTEM.

The Government argues (page 14—Powell Brief) that the rule of probable cause would require the agent, before proceeding with an investigation of open years, to establish probable grounds to suspect a deficiency for those years. The Government does admit, as do we, that such is not the case for the open years and it would appear that the reason is found at Section 7602 of the Code, which authorizes the agent to verify the correctness of any return. The applicable words of the Section are as follows:

"EXAMINATION OF BOOKS AND WITNESSES.

"For the purpose of ascertaining the correctness of any return . . ."

It is clear that, during the open years, verification is a routine and authorized check of the return with the books. Also, the necessity may sometimes arise to verify the books with some new fact which has come to the attention of the Commissioner about the income of the taxpayer.

The Government continued its argument by saying that the mere expiration of the three-year statute of limitation in no way diminishes the duty of the Commissioner to determine the liability of any person for internal revenue tax. It must be clear, however, that the statute of limitations indeed does greatly diminish the duty of the Commissioner. For, he would appear to be foolish to send his agents out to make a routine verification of returns for years barred by the statute of limitations, or for a mere verification of the books for such years with some new fact about the taxpayer's income, unless fraud were reasonably indicated. As stated heretofore, it would be unnecessary to verify a return for a barred year merely for the sake of verification. It would be unnecessary to look for additional tax liability for such years unless fraud were probable or reasonably anticipated before beginning. The statute clearly diminishes the responsibility of the Commissioner and he recognizes it.

The Government then further argues by asking that, if probable cause is not prerequisite to an in-

vestigation within the three-year open period, then how can it be required for the years barred and open only for fraud? The Government then says that the "present fraud" investigation falls squarely within the terms of the Commissioner's statutory authorization, and as such can hardly be deemed "unnecessary." The Government then says that this is true because it is necessary to examine to determine if fraud has been committed. It would appear that by using the phrase "present fraud" the Government is thereby assuming and presuming that "fraud" already exists and that the fraud is known or that there is some fact in hand which reasonably indicates that a fraud has been committed by the taxpayer. Thus it appears that the Government has, in a way, acknowledged the necessity of the existence or probable cause to believe that fraud exists to permit the inspection of the taxpayer's books for the barred years. The Government apparently admits that they must have some factual basis to assume and presume that the taxpayer has committed a fraud on the tax. This would appear to be the "necessity" intended by the Congress.

The further argument by the Government is that the Congressional policy to guard against frauds on the revenue is reflected in the severe criminal penalties and the severe civil penalties and, still further, by the Congressional removal of the bar of statute of limitations as to civil fraud. The exact words of the Government are, as follows (Powell Brief, page 15):

> "Our conclusion accords with the clearly defined Congressional policy to guard against frauds

on the revenue, which is reflected in *the imposition of severe criminal and civil penalties* . . ." (Italics supplied.)

The Government continues with the statement that to require the Government to make a showing of probable cause at precisely the time, when the Commissioner most needs his full array of investigative powers, would seriously impair his efforts to detect fraudulent returns.

In the first place, it is confusing, on the part of the Government, to mix in the same sentence a criminal income tax case with a civil income tax case, as revealed by the language found in the Government's brief. To begin with, the taxpayer may stop the Government "cold" in its investigation in a criminal income tax case by the exercise of his constitutional privilege—the Fifth Amendment—and he may, in such a case, refuse to surrender his books and records for examination by the Government agents. Therefore, the Constitution, no less, does what the Government in its brief argues that the Congres should not do—that is, to stop the Commissioner when he needs most his full array of investigative powers.

The argument by the Government as to the criminal case is no more correct and no more convincing that the argument for the civil case. For, it is clear from Section 7605(b) that the Congress intended to stop the Commissioner unless he has some official reason or a probable cause to investigate the taxpayer's books and records for barred years. And, in speaking of criminal income tax evasion, if the Congress in-

tended to be so severe and harsh, as the Government argues, then why did they provide the six-year statute of limitations for criminal fraud which bars forever the prosecution for income tax evasion? Why bring down the curtain at all for the "criminal"? But, why not prosecute him forever rather than just six years?

Further, since evil intent is such an elusive thing, an innocent taxpayer might well refuse to surrender his books if he thinks he may have done something, without evil intent, which he thinks some third party may think was evil. Too, the taxpayer seldom, if ever, understands the refinements of the difference between criminal income tax fraud and civil income tax fraud. What is the difference? It is simply the difference between "beyond a reasonable doubt" and "a preponderance of evidence." Would the ordinary taxpayer know the difference? We think not. If a taxpayer has had evil intent and has filed a fraudulent return, if he is advised or so wishes, he may plead the Fifth Amendment and not surrender his books or talk to the agent. If a taxpayer has not been fraudulent, then he should never be bothered and his books should never be demanded by the agent since he can not be liable for additional taxes for the barred years.

The backbone of the Federal income tax system is the self-assessment by the taxpayer when he prepares and files his return. Each taxpayer assesses himself when he prepares and files his return. The whole system is based on and depends upon this self-assessment. The success of the Federal income tax collections and system depends on this self-assessment. Too, it is

predicated on the belief that every taxpayer, with extremely rare exceptions, is honest and files an honest return. The system is based also on the position that the honest taxpayer should not be harassed and badgered but that he should be protected and encouraged. The law as passed by Congress in Section 7605(b) (as well as 7605(a)) is designed to protect and to encourage the taxpayer in his honest self-assessment. And, the verification of the income tax return by the Commissioner as provided by Section 7602 is designed to determine if the taxpayer has correctly assessed himself. If the taxpayer has erred in his self-assessment, in preparing and filing his return, then the return is corrected and the additional tax is collected or the overpayment is refunded. It is therefore clear that the main goal of the inspection by the Commissioner of the taxpayer's books is to verify or ascertain the correctness of the self-assessment.

Further study of the Internal Revenue Code reveals the protection and encouragement intended by the Congress. For instance, there is a three-year statute of limitations, after which period additional taxes are barred with two exceptions (Section 6501). First, the years are open for six years where there is 25 per cent omission of income and this is without the need of proving fraud (Section 6501(c)). Second, where there is fraud the statute never bars the collection of additional taxes. So long as the three years are open, additional tax may be collected without fraud or the 25 per cent omission. From three years to six years, additional taxes may be assessed and collected by show-

ing that the taxpayer omitted 25 per cent of tax or, if no omission of 25 per cent, then only if there is fraud. After six years, however, the "curtain is drawn" completely except and save only in the case of fraud.

During the first three years, when the years are not barred, the Commissioner has the great benefit and advantage of the presumption of the correctness of his determination. The Commissioner need only set up additional tax for the open years and his determination is presumed to be correct. The taxpayer then has the burden of proving that the Commissioner erred. It is therefore clear that the Congress makes it more difficult for the taxpayer during the open years than at any other time.

Congress, in passing the statute of limitations, has however made it more difficult for the Commissioner after the three years expire, that is, during the barred years. For then, the Government has the burden of proof of the 25 per cent omission. The Government also has the burden of proof of fraud. For instance, the Government has the heavy burden of proving both of the following:

(1) A *bad return* filed, and
(2) An *evil intent* in filing it.

The heavy burden placed on the Commissioner, during the barred years is seen by the fact that he does not meet his burden where the following exists:

(1) a bad return (2) but a good intent
(1) a good return (2) but an evil intent

A bad return means that it must have omitted tax, however an erroneous return alone is not sufficient

but it must have been filed with evil intent. The most evil intent in the world, as to a filed return, will not help if the return reports all (or more) of the income tax which the taxpayer owes from all of his income.

Admittedly, if the Government succeeds, however, in proving fraud, the penalties for the taxpayer are severe, as follows:

(1) Criminal fraud—penitentiary sentences and fines
(2) Civil fraud—penalty of 50 per cent of additional tax

A taxpayer will be subjected to the civil fraud penalty if he is found guilty of criminal fraud. He can be subjected to the civil fraud penalty without being subjected to the criminal penalty.

It would appear that one of the main purposes of Congress in providing the statute of limitations (the three year and the six year) is to arouse and push the agent to expeditiously examine during the three open years, when the burden of proof as to additional tax is on the taxpayer and not on the Government. It is clear that one of the main purposes of the Congress in providing the clause "no unnecessary examinations and investigations," found at Section 7605(b), was to further arouse and push the agent into the completion of all examinations during the three open years and not to have him wait to begin, after the years are barred. In other words, it is clear that the Congress has provided that the open season for "fishing" or verification is during the three open years.

II. "EXAMINATION AND INVESTIGATION" ARE NOT THE SAME AS "INSPECTION."

A study of certain of the language of Section 7605(b) would further appear to reveal the true intent of the Congress. This language is as follows:

> ". . . and only one *inspection* of a taxpayer's books of account shall be made for each taxable year *unless* the taxpayer requests otherwise *or unless* the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional *inspection* is necessary." (Italics supplied.)

Thus it says and means that a second inspection may be made only if the taxpayer requests or that the Secretary or delegate, after investigation, notifies the taxpayer that a second inspection is necessary. That is, the Code says, as to the wishes of the taxpayer, a second "inspection" of the taxpayer's books shall not be made *"unless"* and only *"unless"* the taxpayer requests. Now, it says only one inspection unless the taxpayer requests a second inspection. In other words, the taxpayer may request a second *inspection*, however he would only make such request, when and if the years were open. That is, he would request only for the three open years because he would request only when and if he had overpaid his taxes and could recover the overpayment, of if he had underpaid and the additional tax could be assessed and collected by the Commissioner. The taxpayer would never request a second inspection for barred years for the sole purpose

of determining an overpayment or underpayment of tax for those years.

Since the above two (unless) exceptions to the rule, that only one inspection may be made of the taxpayer's books are linked together in the same clause, it would clearly appear that the Congress intended that this authorized second inspection should only apply to the open years. That is, since it appears that the taxpayer was expected to ask for another inspection only as to the three open years, therefore Congress must have intended the same to be true as to the request by the Secretary or his delegate for a second inspection.

The words "examination and investigation" as used in the first part of Section 7605(b) carry a very different meaning from the word "inspection" as used later in connection with the books of the taxpayer. It is clear that the Congress did not intend, as the Government argues, that the words mean the same thing. The words "examination and investigation" certainly do not mean *repetitive inspections* of the taxpayer's books. The words "examination and investigation" take into account the whole rampart of the determination of the correctness of the taxpayer's filed returns. These words, as commonly understood, cover the activity of the agent from start to finish of his case, as it applies personally to the taxpayer. If the Congress had not so intended, they would have used the phrase "unnecessary inspections" instead of "unnecessary examinations and investigations." The word

"inspection" as used here, applies solely to the books and means the "looking" at the books.

Too, the word "unnecessary" as used here by the Congress is said by Webster's dictionary to carry a meaning of "needless, useless, or not required under the circumstances." It would clearly appear that the Congress intended that the word "unnecessary" carry its commonly accepted Webster dictionary meaning. The obvious meaning here therefore, where Webster says "not required under the circumstances," is that the Secretary or his agent must have a reasonable basis to suspect fraud to entitle him to inspect the taxpayer's books for the barred years, open only by fraud. As Mr. Justice Douglas once observed, "Whatever the reason, words mean what they say."

Further, it may well have been, as the Government argues, that the Congress hoped and intended that the requirement, that the Secretary write the taxpayer that a second "inspection" of his books was necessary, would be sufficient administrative control of the agent to allow the taxpayer his deserved peace of mind. It may well have been thought that this would lead to an end of repetitive inspections of the taxpayer's books and the end of the frivolous and oppressive inspections of the taxpayer's books.

III. DESTRUCTION OF FILED RETURNS BY CONGRESS INDICATES LEGISLATIVE INTENT TO REQUIRE PROBABLE CAUSE FOR BARRED YEARS.

It is a matter of law that Federal income tax returns may be destroyed by the Commissioner upon the approval of Congress. And, authority has been granted by the Congress from time to time for the Commissioner to destroy returns, the most recent of which authorizations are found in House Reports No. 2285, 84th Congress, Second Session; No. 819, 85th Congress, First Session; No. 690, 86th Congress, First Session; and No. 1175, 86th Congress, First Session.

It would therefore appear from these reports that, pursuant to this Congressional authority, the individual returns for the years prior to 1956 generally have been destroyed. If Congress intended that all books and records be kept forever, they would not therefore authorize the destruction of the original returns filed by an individual taxpayer. Further, when the original filed returns are destroyed, how can the Commissioner or his agent verify a return which he does not have? How can he determine whether or not the taxpayer has filed a correct return?

The Congress does not intend that the return, for barred years open only by fraud, be examined except where the Commissioner or agent has a reasonable basis to suspect fraud. It would clearly appear that the Congress, in ordering the destruction of the filed returns, recognizes that the honest taxpayer is entitled to a peace of mind and that in using the words

"unnecessary examinations and investigations" it was intended that this peace should be disturbed only when there was probable cause to suspect fraud.

Assuming that the agent submitted his basis for a suspicion of fraud and the District Court refused him, even without his demanded inspection of the books, the examination and investigation by the agent of the taxpayer would surely continue, that is, if the agent had in hand facts which revealed a reasonable basis of a suspicion of fraud to warrant the continued examination. The mere fact that the agent could not inspect without showing a reasonable basis, does not mean that the agent may never look at the books. Because, if he, the agent, has something more than a mere personal desire to "fish," then he can send the taxpayer a statutory notice, and then he, or the Appellate advisor of the Treasury, can demand to know the content of the books before settling the case. Or, in the event of trial in the United States Tax Court, the Treasury counsel may subpoena the records, which would require the taxpayer to produce his books in court for the inspection of the counsel and the agent. If there is evidence of fraud in the books, then that fraud will be revealed.

It is therefore eminently clear that the interpretation here asked by the taxpayer will not interfere in any way in the enforcement of the civil penalty for fraud. It will, however, stop the harassment of the honest taxpayer by an unscrupulous agent. And this was surely the purpose of Congress in using the words,

"the taxpayer shall not be subjected to unnecessary examinations."

The facts of the instant case present the very situation which the Congress had in mind when Section 7605(b) was written into law. The Congress will not tolerate the harassment and hounding of honest taxpayers such as in the instant one, solely for the primary personal purpose of the agent. It must be always that the Commissioner or his agent has a reasonable basis of suspicion of fraud when he begins an examination of barred years, otherwise the examination would not have been started. Their good judgment would normally be presumed. The only instance when there would be no reasonable basis would be where the agent had a personal motive—an evil motive—perhaps, a motive of personal vengeance in making the examination. Otherwise, the examination would never have been begun without a good cause.

The Congress also recognized that, where the agent is arbitrary and wrongful, it is almost impossible for the taxpayer to be able to prove this evil on the part of the agent. The Congress obviously realized that the best evidence of evil by an agent was a showing that he had no real purpose in making his examination, that is, that he had no reasonable basis to suspect fraud.

WILLIAM R. BAGBY,
1107 First National Building,
Lexington, Kentucky,
Counsel for Petitioner.

October, 1964